

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

No. 387.

EBEN J. KNOWLTON AND THOMAS A. BUFFUM, EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDWIN F. KNOWLTON, DECEASED, PLAINTIFFS IN ERROR,

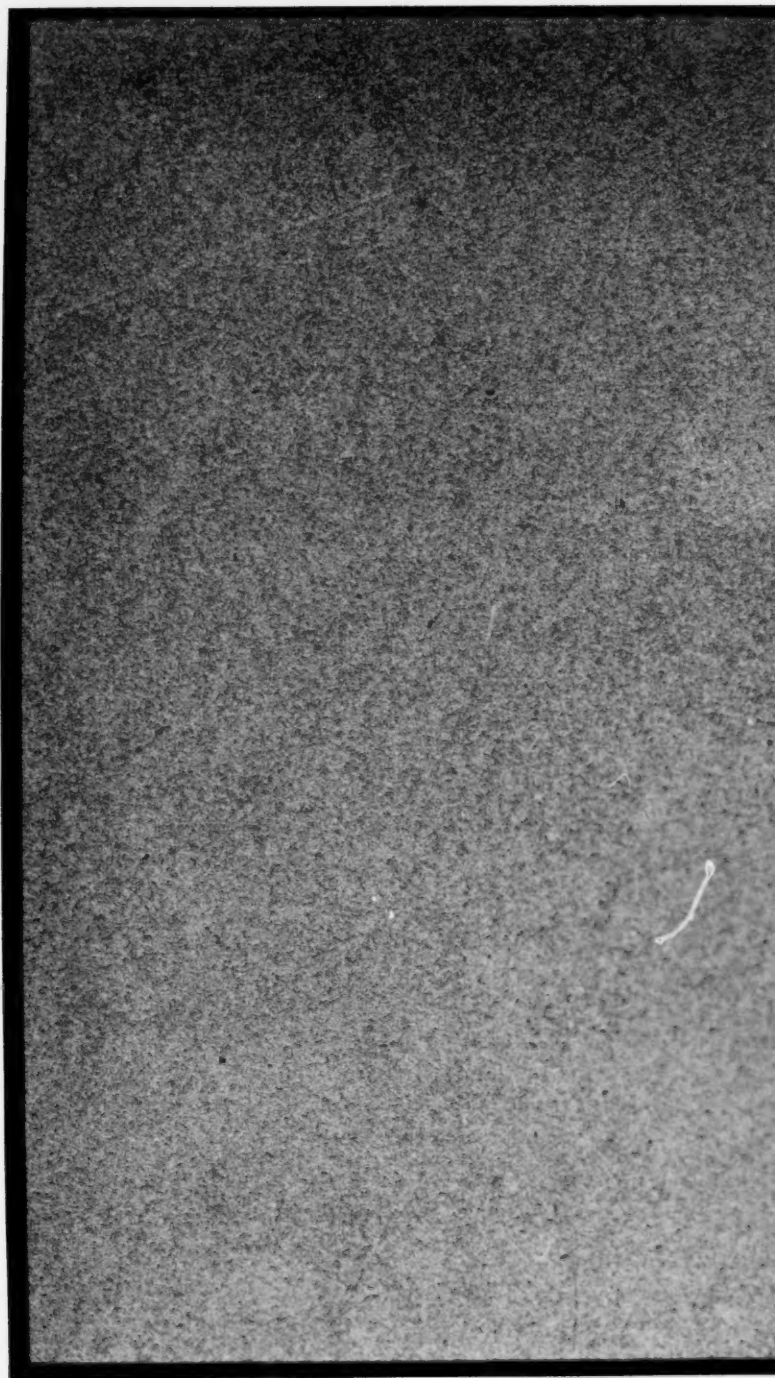
vs.

FRANK R. MOORE, UNITED STATES COLLECTOR OF INTERNAL REVENUE, FIRST COLLECTION DISTRICT, STATE OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED AUGUST 30, 1899.

(17,501.)



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1 United States Circuit Court for the Eastern District of New
York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of
and under the Last Will and Testament of Edwin F. Knowl-
ton, Deceased, Plffs,
against
FRANK R. MOORE, as United States Collector of Internal Reve-
nue, First District, State of New York, Def't.

Please to enter my appearance as attorney for the plaintiffs in the above-entitled cause and issue summons to the marshal for service upon the defendant above named.

CHARLES H. OTIS,
Attorney for Plaintiff.

Dated May 12, 1899.

To the clerk of the circuit court of the United States for the eastern district of New York.

Endorsed: Notice of appearance and requisition for summons.
Filed the 12th day of May, 1899.

2 United States Circuit Court for the Eastern District of New
York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of
and under the Last Will and Testament of Edwin F. Knowl-
ton, Deceased, Plffs,
against
FRANK R. MOORE, as United States Collector of Internal Re-
venue, First District, State of New York, Defend't.

To the above-named defendant :

You are hereby summoned to answer the complaint in this action and to file your answer and serve a copy thereof on the plaintiffs' attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the borough of Brooklyn, this 12th day [L. S.] of May, in the year one thousand eight hundred and ninety-nine.

B. LINCOLN BENEDICT, *Clerk.*

CHARLES H. OTIS,
Plaintiffs' Attorney.

Office and post-office address, 189 Montague street, borough of Brooklyn, New York city, New York.

(Endorsed :) United States circuit court, eastern district of New York. Eben J. Knowlton *et al.*, as executors, &c., of Edwin F. Knowlton, deceased, *vs.* Frank R. Moore, as U. S. collector of internal revenue. Case No. 1. Original. Summons Charles H. Otis, plaintiffs' attorney. To the defendant within named. Take notice that upon default judgment will be taken for the sum of — dollars in money, with interest from the — day of —, 189—, besides cost. — —, plaintiff's attorney. Filed May 12, 1899.

UNITED STATES OF AMERICA, }
Eastern District of New York. } ss :

I hereby certify that on the 12th day of May, 1899, at Federal building, I personally served the within summons & complaint on the within-named defendant, Frank R. Moore, by showing him the same and delivering to and leaving with him a true copy thereof.

CHARLES J. HAUBERT,

U. S. Marshal,

By HENRY R. EVARTS, *Deputy.*

3 United States Circuit Court, Eastern District, State of New York.

EBEN J. KNOWLTON and THOMAS A. BUF-
 fum, as Executors of and under the Last
 Will and Testament of Edwin F. Knowl-
 ton, Deceased, Plaintiffs.

against

FRANK R. MOORE, as United States Col-
 lector of Internal Revenue, First District,
 State of New York, Defendant.

} Amended Complaint.
 No. 1.

The above named plaintiffs, as and for their amended complaint and cause of action against the defendant above named, allege :

I. That the defendant, Frank R. Moore, was at all the times herein referred to and now is United States collector of internal revenue for the first district, State of New York.

II. That heretofore and on the 25th day of October, A. D. 1898, Edwin F. Knowlton departed this life, being at the time of his decease a resident of the borough of Brooklyn, county of Kings, city and State of New York, in the eastern district of New York, leaving a last will and testament and codicil, wherein and whereby he did nominate, constitute, and appoint as executors thereof these plain-
 tiffs, and which said last will and testament and codicil were

4 duly admitted to probate by the surrogate's court of the county of Kings, State of New York, on the 14th day of November, A. D. 1898, and on the same day letters testamentary of and under the said last will and testament and codicil were duly issued by and out of the said surrogate's court to these plaintiffs. Annexed hereto and marked Exhibit "A" is a copy of the said last will and testament and codicil, which are hereby made a part of this complaint as though here inserted at length.

III. That the value of the personal property and estate of said Edwin F. Knowlton on the 25th day of October, A. D. 1898, the date of his decease, as fixed and determined by appraisers duly appointed, was the sum of \$2,624,029.63, and the amount of the debts of the decedent, his funeral expenses, commissions of executors, and general expenses of administration have amounted to or will amount to the sum of \$64,129.69, leaving a net value as so appraised of the personal estate of said testator passing to the legatees named in his last will and testament of \$2,559,899.67.

IV. That thereafter and on or about the 31st day of March, A. D. 1899, these plaintiffs, upon demand of the defendant, did make and render to the said defendant, as such collector aforesaid, a schedule, list, or statement in duplicate of the amount of the legacies bequeathed by said last will and testament, and at the direction of the defendant, as such collector, did include in said statement certain sums claimed and alleged by the said defendant, as such collector, to be the amount of duty which had accrued thereon, verified by the oath of these plaintiffs, under and pursuant to the provisions of sections 29 and 30 of an act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures, and for other purposes," administered according to law, and at the same time did file with the said statement a protest on the part of these plaintiffs, as such executors aforesaid, in writing, a copy of which said statement and protest filed therewith is hereto annexed and marked Exhibit "B" and is hereby made a part of this complaint as though here inserted at length.

V. That as these plaintiffs are informed and verily believe, the said defendant, as such collector, did make return of the said statement and protest and of the said alleged tax to the United States Commissioner of Internal Revenue, who did thereafter and on or about the 12th day of April, A. D. 1899, assess or attempt to assess against the said plaintiffs, as such executors aforesaid, an alleged tax of \$42,084.67, under the alleged and pretended authority of sections 29 and 30 of an act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," and did transmit the same to the defendant, as such collector, for collection.

VI. Thereafter and on or about the 12th day of April, A. D. 1899, the defendant, as such collector, did cause to be served upon these plaintiffs, as such executors aforesaid, a notice in writing that the said alleged tax had been assessed against these plaintiffs, and did make demand for the said tax, a copy of which said notice and demand is hereto annexed and marked Exhibit "C" and is hereby made a part of this complaint as though here inserted at length.

VII. That thereafter and on the 17th day of April, A. D. 1899, these plaintiffs did cause to be delivered to the defendant, as such collector, a protest in writing against the alleged and pretended assessment of the said alleged tax, and did therein refuse to make payment of the same. A copy of said written protest and refusal

is hereto annexed and marked Exhibit "D" and is hereby made a part of this complaint as though here inserted at length.

VIII. That on the 17th day of April, A. D. 1899, these plaintiffs, as such executors aforesaid, did receive from the defendant, as such collector, a notice that unless the said alleged tax should be paid on or before April 22, 1899, a penalty of five per centum and interest would be added thereto and a notice of the aggregate amount due would then be served upon these plaintiffs, and at the end of ten days from such service, unless the amount claimed therein should have been paid, distraint warrant would issue and the defendant, as such collector, would proceed to collect the said sum as provided in section 3187 of the Revised Statutes of the United States, wherein and whereby the said defendant, as such collector, did threaten to enforce the collection and payment of the said alleged tax by issuance of distraint warrant as aforesaid. Annexed hereto and marked Exhibit

7 "E" is a copy of said communication of April 17, 1899, containing the aforesaid threat, which is hereby made a part of this complaint as though here inserted at length.

IX. Thereafter and on the 18th day of April, A. D. 1899, upon compulsion of the aforesaid threat of the defendant, as such collector, and to prevent the addition of the aforesaid penalty of five per centum of the said alleged tax, and to prevent issuance and execution of a distraint warrant to enforce the collection of the said alleged tax, these plaintiffs did pay to the defendant, as such collector aforesaid, under protest, the sum of \$42,084.67, the amount of the said alleged tax, by the certified check of these plaintiffs, as such executors aforesaid, and did at the same time deliver to the defendant, as such collector, a further protest against the said alleged assessment and tax and his threat to enforce payment of the same by issuance and execution of distraint warrant. Annexed hereto and marked Exhibits "F" and "G" respectively are true copies of the said check and the said written protest accompanying the same, which are hereby made part of this complaint as though here inserted at length.

X. That upon the delivery of the said certified check for \$42,084.67, as aforesaid, the said defendant, as such collector aforesaid, did deliver to these plaintiffs, in duplicate, receipts for the aforesaid amount, showing that the same had been paid under protest. Annexed hereto and marked Exhibit "H" is a copy of the said receipts.

8 XI. That thereafter and on or about the 20th day of April, A. D. 1899, these plaintiffs, as such executors aforesaid, did make an appeal in writing to the United States Commissioner of Internal Revenue to remit, refund, and pay back to these plaintiffs, as such executors as aforesaid, the said alleged tax upon the ground that the said alleged assessment and the said alleged tax and the exaction of payment thereof were erroneous and improper, and that the said alleged tax was null and void and of no binding force or effect, for the following reasons, among others:

The provisions of sections 29 and 30 of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet

war expenditures, and for other purposes," under which it is sought to impose, assess, and collect the said tax or duty, are in violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void, and the said tax is therefore void. Annexed hereto and marked Exhibit "I" is a copy of the said appeal to the said United States Commissioner of Internal Revenue, which is hereby made a part of this complaint as though here inserted at length.

XII. That the said The United States Commissioner of Internal Revenue did deny and reject the said appeal and claim of these plaintiffs, and did refuse to remit or refund the said alleged tax or any part thereof, and the defendant, as such collector aforesaid, on or about the 10th day of May, A. D. 1899, did cause to be served upon these plaintiffs, as such executors, a written notice of such denial and rejection, copies whereof are hereto annexed and marked Exhibits "J" and "K" and are hereby made a part of this complaint as though here inserted at length.

XIII. That, as these plaintiffs are advised and verily believe, the said alleged assessment and tax are wholly illegal, null, void, and of no force or effect, for that the provisions of the aforesaid act of Congress under which it was sought to impose and assess the said alleged duty or tax are unconstitutional and void, and especially are in direct violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, which are as follows:

ART. I, SECTION 8. The Congress shall have power—

SUB. 1. To lay and collect taxes, duties, imposts and excises; to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.

ART. I, SECTION 9, SUB. 4. No capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken.

Wherefore these plaintiffs demand judgment against the defendant for the sum of \$42,084.67, with interest thereon from the 18th day of April, A. D. 1899.

CHAS. H. OTIS,
Att'y for Plaintiffs.

Office and post-office address, No. 189 Montague street, borough of Brooklyn, city of New York, N. Y.

10 STATE OF NEW YORK, } ss:
County of Kings, }

Eben J. Knowlton and Thomas A. Buffum, being duly and severally sworn, each for himself deposes and says that the foregoing amended complaint is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

EBEN J. KNOWLTON.
THOS. A. BUFFUM.

Sworn to before me this 1st day of June, A. D. 1899.

JOHN F. REGAN,
*Commissioner of Deeds, City of New York,
Residing in the Borough of Brooklyn.*

11

EXHIBIT "A."

The Last Will and Testament of Edwin F. Knowlton, of the City of Brooklyn, County of Kings and State of New York.

I, Edwin F. Knowlton, of said city of Brooklyn, do hereby make, publish, and declare this my last will and testament in manner and form following—that is to say:

First. I direct my executors hereinafter named to pay and discharge all my just debts and liabilities and funeral expenses.

Second. I give and bequeath to my beloved daughter, Mary Countess von Francken Sierstorpf, now residing in Germany, if she shall survive me, all my books, pictures and picture frames, household goods and furniture, table and silver ware, articles of wearing apparel, articles of ornament, all souvenirs and mementoes and all articles of personal property that may be in my dwelling house or houses at the time of my death, except my gold watch and chain, which I hereby give to my brother George W. Knowlton.

Third. I give and bequeath to the Unitarian church of West Upton, Massachusetts, five thousand dollars.

Fourth. I give and bequeath to my beloved sister Charlotte A. Batchelor, five thousand dollars.

12 Fifth. In view of my desire hereinafter expressed that my brother Eben J. Knowlton, shall act as one of the executors of this my will without compensation, I hereby give and bequeath to him ten thousand dollars, and I direct that the same shall be in lieu of all commissions or other compensation to him as one of my executors, and I give and bequeath to my said brother Eben J. Knowlton, the further sum of one hundred thousand dollars.

Sixth. In view of my desire hereinafter expressed, that Thomas A. Buffum, of the city of Brooklyn, shall act as one of the executors of this my will without compensation, I hereby give and bequeath to him five thousand dollars and direct that the same shall be in lieu of all commissions or other compensation to him as one of my executors.

Seventh. I give and devise to my said daughter Mary Countess von Francken Sierstorpf if she shall survive me, my house and lot corner of Columbia heights and Pierrepont street in the city of Brooklyn, county of Kings and State of New York, being the same premises described in deed from Seth Low and Annie W. S. Low, his wife, to myself, dated January 6th, 1890, and recorded in the office of the register of the county of Kings in Liber 1938 of Conveyances, page 334, and also my stable and lot on College place in said city, being the same premises described in deed from Frank T. King to myself, dated January 31st, 1895, and recorded in said register's office in Liber 1 of Conveyances in section 1, block 236,

page 144, to have and to hold to her, her heirs and assigns forever.

13 Eighth. I hereby give and bequeath to my said daughter Mary Countess von Francken Sierstorpf if she shall survive me, one hundred thousand dollars.

Ninth. I am intending, during my life, to accomplish the incorporation, establishment and endowment of a free public library with reading and art rooms to be located in the village of West Upton in the town of Upton and State of Massachusetts to be known as the "Knowlton memorial library" for the use of the people of the said town of Upton under such regulations as the managers of the corporation may prescribe, but should I not accomplish the same during my life, then I direct my executors and the survivor of them, during their lives or the life of the survivor of them and within two years after my death, to procure the formation of a corporation with capacity to establish such a free public library with reading and art rooms as above more fully specified, either by act of the legislature of the State of Massachusetts or under the general laws of that State, and I direct my said executors and the survivor of them to retain in their hands forty thousand dollars until such incorporation shall be obtained, but not beyond the time above specified, and upon such incorporation being obtained within such time I direct my said executors and the survivor of them to pay the said sum of forty thousand dollars to the corporation so to be created for the uses and purposes for which it is so to be created, and I make

14 this further provision, if competent for me to do so, to wit: that the approval by my said executors or the survivor of them of the form of the charter of said corporation shall be conclusive and binding upon all persons whomsoever to establish the right of my said executors and the survivor of them to pay said sum to the corporation so formed.

If, however, such corporation shall have taken place in my lifetime, then I give to such corporation such sum as, with whatever amount I shall have given to it during my lifetime, shall make altogether the sum of forty thousand dollars, and I hereby fully empower my executors and the survivor of them to examine and determine in such way as they or he may deem proper the proper amount that may be required to make up the said full sum of forty thousand dollars and their decision in the matter shall be conclusive upon all parties interested.

Tenth. All the rest, residue and remainder of my property of every name and nature and wheresoever situated not required to satisfy the foregoing provisions of this my will including any of the gifts hereinbefore made that may lapse or fail to take effect, I dispose of as follows:

Unless all the trusts hereafter provided for shall wholly fail to take effect, I direct my executors hereinafter appointed to pay and deliver over one-half of my said residuary estate as near as they can conveniently arrive thereat, to the Brooklyn Trust Company and the balance thereof to the Franklin Trust Company, both in the city of Brooklyn, in trust if my said daughter shall survive me, to

15 keep the same duly invested and to pay the income thereof semi-annually to my said daughter during her natural life, said companies to so arrange, if possible, between themselves that the semi-annual income shall be paid by one in January and July and by the other in April and October, and

Upon her death I direct each of said trust companies to divide the trust fund or estate held by it into as many equal shares as shall be the number her children who shall survive her and those who shall have died leaving lawful issue who shall survive her, and to set apart one share for each of said children so surviving her and such issue of each deceased child; and

To each of the said children surviving her who shall be in being at my death, to pay the income of the share set apart for him or her, to him or her during his or her natural life, and upon his or her death to pay the principal of such share in equal proportions to his or her lawful issue then living, if any, *per stirpes* and not *per capita*, and, if not any, then to pay and distribute one-half of such principal to and among his or her brothers and sisters then living, if any, and the lawful issue, if any, then living of any deceased brother or sister in equal proportions, but so that such issue shall take the share their parent would have taken, if living, *per stirpes* and not *per capita*, and to pay and distribute the other half of such principal, unless there shall be no brother or sister then living, nor lawful issue then living of any deceased brother or sister, and in that event, the whole of such principal to and among my nephews

16 and nieces then living and the lawful issue then living of any nephew or niece of mine, who shall have died, in equal proportions, save only that the share for each of the children of my brother Daniel W. Knowlton, and the lawful issue of each deceased child of his shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces and that such issue shall take the share their parent would have taken if living, *per stirpes* and not *per capita*, and

I direct each of said trust companies during the life of the youngest one of those of my nephews now living who shall be living at the death of my said daughter, if any, to keep the share set apart for each child of my said daughter living at her death who shall not be in being at my death and for the lawful issue then living of each deceased child of hers duly invested and

To pay the income of each share set apart by it for each such child, to such child or in case he or she shall die during the said specified life, then in equal proportions to his or her lawful issue the survivors and survivor of them *per stirpes* and not *per capita*, and in case of failure of lawful issue, then in equal proportions to the then surviving children and lawful issue of each deceased child of my said daughter including children born before my death, the survivors and survivor of them, issue in all cases to take the share their parent would have taken if living, *per stirpes* and not *per capita*, and

17 To pay the income of each share, set apart for the lawful issue of each deceased child, in equal proportions, to such issue the survivors and survivor of them *per stirpes* and not *per capita* or should all such issue die during the said specified life then in equal proportions to the surviving children and the lawful issue of each deceased child of my said daughter, including children born before my death, the survivors and survivor of them, issue in all cases to take the share their parent would have taken if living, *per stirpes* and not *per capita*, and

To dispose of the shares so to be set apart for children not in being at my death and for the lawful issue of deceased children, on the termination of said specified life or, in case of any shares as to which the trust intended therefor shall for any reason fail to take effect, at the death of my said daughter or shall thereafter cease before the termination of said specified life, then as to such shares respectively, upon the death of my said daughter or the said subsequent cessation of the trust as the case may be, as follows, to wit:

To pay and distribute the share, set apart for each such child, to such child, if such child shall then be living and shall have lawful issue then living, or if such child shall not be living but shall have lawful issue then living, then to such issue in equal proportions, *per stirpes* and not *per capita* and if neither shall be the case, then to

18 pay and distribute such share as follows, to wit: One-half thereof to such child, if such child shall then be living, and if not then to and among my nephews and nieces then living and the lawful issue then living of any nephew or niece of mine who shall have died in equal proportions, save only that the share for each of the children of my brother Daniel W. Knowlton, and the lawful issue of each deceased child of his, shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces, and that issue shall take the share their parent would have taken if living, *per stirpes* and not *per capita*, and to pay and distribute the other half of such share in equal proportions to and among the brothers and sisters then living, if any, of such child and the lawful issue then living, if any, of any deceased brother or sister, in equal proportions, but so that such issue shall take the share their parent would have taken if living, *per stirpes* and not *per capita*, or in case there shall be no brother or sister or lawful issue of any deceased brother or sister then living, then in equal proportions to and among my nephews and nieces then living and the lawful issue then living of any deceased nephew or niece of mine in equal proportions, save only that the share for each of the children of my brother, Daniel W. Knowlton, and the lawful issue of each deceased child of his shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces, and that issue shall take the share their parent would have taken

19 if living, *per stirpes* and not *per capita*, and

To pay and distribute the share, set apart for the lawful issue of each deceased child, to such issue in equal proportion *per stirpes*

and not *per capita* if any shall then be living, and if not, then one-half thereof to and among the brothers and sisters then living, if any, of such deceased child and the lawful issue then living of any deceased brother or sister of such deceased child, in equal proportions, but so that such issue shall take the share their parent would have taken if living *per stirpes* and not *per capita*, and to pay and distribute the other half thereof, unless there shall be no such brother or sister then living, or lawful issue then living of any such deceased brother or sister, and in that event, the whole of the share, to and among my nephews and nieces, then living and the lawful issue then living of any nephew or niece of mine who shall have died, in equal proportions, save only that the share for each of the children of my brother Daniel W. Knowlton and the lawful issue of each deceased child of his shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces, and that such issue shall take the share their parent would have taken if living *per stirpes* and not *per capita*.

If my said daughter shall not survive me, but shall leave children who shall survive me, the said trust companies shall receive my said residuary estate as above specified in this article of this my
 20 will, each in trust to divide the part received by it into as many equal shares as shall be the number of children of my said daughter, who shall be living at my death, and to set apart one share for each child and to keep the same duly invested and to pay the interest and income of the share, set apart for each child to such child during his or her natural life and upon the death of such child to pay the principal of such share to his or her lawful issue then living, if any, in equal proportions, *per stirpes* and not *per capita*, or if there shall be no lawful issue then living to pay and distribute one-half of such principal to and among his or her brothers and sisters then living if any, and the lawful issue, if any, then living, of any deceased brother or sister in equal proportions, but so that such issue shall take the share their parent would have taken if living, *per stirpes* and not *per capita*, and to pay and distribute the other half of such principal, unless there shall be no brother or sister then living nor lawful issue then living of any deceased brother or sister, and in that event, the whole of such principal to and among my nephews and nieces then living and the lawful issue then living of any nephews or nieces of mine who shall have died, in equal proportions, save only that the share for each of the children of my brother Daniel W. Knowlton, and the lawful issue of each deceased child of his shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces, and that issue shall
 21 take the share their parent would have taken if living *per stirpes* and not *per capita*.

If, however, my said daughter shall die leaving no child nor lawful issue of any deceased child of hers her surviving, then said trust companies shall upon her death, or if she shall so die be-

fore me, then my executors shall on my death pay over and distribute my said residuary estate as follows:—

1st. Fifty thousand dollars thereof to my son-in-law Count von Francken Sierstorpf.

2nd. Fifty thousand dollars thereof to the town of Upton State of Massachusetts, to be invested by said town and the income thereof to be used for the support and maintenance of public schools in said town; also fifteen thousand dollars to said town of Upton to be invested by said town and the income thereof used for the support of such of the poor of such town as said town or its officers having charge of its poor may determine should receive help, and I recommend but do not absolutely require, that so far as may be needed and as may be practicable, said income of said fifteen thousand dollars be applied to the support of said poor of said town by aiding them in their own chosen homes or residences.

3rd. All the balance thereof with any of the foregoing legacies of fifty thousand dollars to my son-in-law, and fifty thousand dollars and fifteen thousand dollars to the town of Upton which may lapse or for any reason, fail to take effect, to and among my nephews

and nieces then living and the lawful issue then living of
22 any of them who shall have died, in equal proportions, save only that the share for each of the children of my brother Daniel W. Knowlton, and the lawful issue of each deceased child of his shall be double the share of each of my other nephews and nieces or the share of the lawful issue of each of my other deceased nephews or nieces, and that such issue shall receive the share their parent would have taken, if living, *per stirpes* and not *per capita*.

Eleventh. All gifts herein made to my said daughter including all income to be paid to her, I give to her in and to her whole, sole and separate right and use free from any use, right, community, interest, administration or control of her husband, and I direct that payments thereof shall be made to her accordingly and that her sole and separate receipts shall be good and sufficient receipts as evidence of such payments.

Twelfth. I hereby appoint my brother, Eben J. Knowlton, and said Thomas A. Buffum, the executors of this my will, and in view of my gifts to them in this my will it is my desire and will that they shall serve as my executors without other compensation, and I do hereby direct and it is my will that they and each of them may act as such without giving any security, and I also direct that my said executors need not change my investments except as far as they may determine it to be necessary or needful for the best interests of my estate or the settlement thereof, and I further direct that my said executors in making payment of the legacy to my said daughter

as required above, if she shall survive me, and in making
23 the distribution of my said residuary estate to the Brooklyn and Franklin Trust Companies or any other distributions that may be required to make by this my will, may make such payments and distributions in such of my securities and at such a valuation thereof as they may deem just and proper.

I hereby authorize and empower my executors and their succes-

sors, to sell and convey any or all the real estate of which I shall die seized or possessed, except such as my said daughter shall be entitled to take under this my will, at public or private sale, for such prices and on such terms as they may deem proper and in the meantime to take such care of and to so manage the same as shall seem to them proper and for the best interest of my estate.

Thirteenth. And I hereby authorize said Brooklyn and Franklin Trust Companies to continue the investments in the securities which they may so receive so far as they or their proper officers may deem it prudent to do so and in making investments of my residuary estate, I hereby authorize said trust companies in the exercise of their best judgment to invest on first mortgages on improved real estate situated within the so-called Northern States, in carefully selected first-mortgage bonds of railroad corporations; and in bonds of such manufacturing or commercial corporations as may by them or their proper officers be regarded as sound and on a good financial basis; besides such other securities as the laws of the State of New

24 York may permit trustees to invest trust funds in, preferring however, as a rule, a low rate of interest &c. paying high premiums.

And I further direct that each of said trust companies in dividing the part of my said residuary estate received by it into shares and in paying over and distributing such shares as provided in this my will may make use of any securities in which such part of my residuary estate may be invested at such valuation thereof as it or its proper officers may deem just and proper.

And for greater certainty I hereby declare it to be my intention that each of said trust companies shall be sole trustee of the property so to be paid and delivered over to it as aforesaid, and that neither shall be answerable for the other.

Lastly. I hereby revoke all former wills and codicils by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twenty-eighth day of June, in the year one thousand eight hundred and ninety-seven.

EDWIN F. KNOWLTON. [L. s.]

Subscribed and sealed by Edwin F. Knowlton, the testator above named, in the presence of us and each of us and at the same time by him published and declared to be his last will and testament to us and each of us who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses this 28th day of June, 1897.

THEODORE M. TAFT,

134 St. James Place, Brooklyn, N. Y.

EDWARD H. LADD, JR.,

Plainfield, New Jersey.

HARRISON DIKE,

5 East 17th St., New York City.

25 I, Edwin F. Knowlton, of Brooklyn, having made my last will and testament bearing date the 28th day of June, 1897, do now make this codicil.

I do hereby ratify and confirm my said will in all respects save the ninth section, pertaining to the Knowlton memorial library, which section I do hereby revoke and make void, having changed my mind concerning the establishment of a library.

In witness whereof, I have hereunto set my hand and seal this 26th day of September, A. D. 1898.

EDWIN F. KNOWLTON. [L. s.]

Signed, sealed, published and declared by the said Edwin F. Knowlton as and for a codicil to his last will and testament in the presence of us, who, in his presence and in the presence of each other, have, at his request, subscribed our names as witnesses thereto.

CHARLES A. WATERBURY,
Mamaroneck, N. Y.

GEO. T. WERNER,
207 Hancock Ave., Jersey City.

G. W. KNOWLTON, JR.,
93 Clark St., Brooklyn, N. Y.

26

EXHIBIT "B."

Estate of EDWIN F. KNOWLTON.

STATE OF NEW YORK, }
County of Kings, City of New York, } ss :

Eben J. Knowlton and Thomas A. Buffum, being severally duly sworn, does each for himself depose and say :

On November 14th, 1898, letters testamentary of and under the last will and testament and codicil of Edwin F. Knowlton, deceased, were granted and issued to us by and out of the surrogate's court of the county of Kings.

Said Edwin F. Knowlton died on October 25, 1898. As such executors we have paid out and disbursed, or shall pay out and disburse, the following amounts :

New York Stock Exchange Building Co., vault.....	102.00
George Sessions & Sons, undertaker-, Worcester.....	286.10
Willis E. Stafford & Co., " Brooklyn.....	386.50
William Burtenshaw & Son.....	15.00
Heydenreich Bros.....	1.25
J. H. Whitley.....	4.50
James Weir's Sons.....	40.35
Amer. Dist. Telegraph Co.....	5.83
Davidson & Buckley.....	10.35
J. S. Jones.....	69.50
Edison Electric Ill. Co. of Brooklyn.....	24.67
John J. Purdy.....	5.25
D. H. Schults' Sons.....	91.25

27	Amount brought forward	
	George Roth	69.98
	S. O. Burnett.	17.77
	Brooklyn Union Gas. Co.	10.13
	Isaac W. Rushmore	30.00
	Smiths' Farm Dairy Co.	5.26
	W. R. Hegeman	8.03
	W. H. Hart	61.60
	James Daly & Son	79.25
	Charles S. Phillips	40.00
	B. McCaffrey & Sons	111.00
	F. M. De Meli, for servants' hire, &c.	194.29
	A. H. Muller & Son, expenses sale securities	85.00
	Rockland Lake Ice Co.	50.00
	John J. Kelly	42.00
	John A. McCorkle, M. D.	88.00
	R. M. Smiley	16.75
	Frederick Loeser & Co.	19.52
	W. B. Davis	15.50
	F. M. De Meli	1,000.00
	T. A. Buffum	398.50
	C. A. Waterbury, funeral notices, travel, exp., &c., to January 6, 1899	47.53
	C. A. Waterbury, services	4,500.00
	Legacy to E. J. Knowlton, as compensation for services as executor	10,000.00
	Commission to which Thomas A. Buffum is entitled as executor, he having renounced the special legacy given and bequeathed to him in lieu of commission	26,197.32
	Expenses of administration	20,000.00
	Total	\$64,129.98

28 Mary, Countess von Francken Sierstorpff, the only child of Edwin F. Knowlton, deceased, and to whom was bequeathed the income from the residuary estate of the testator during the term of her natural life, was born on July 2, 1870.

EBEN J. KNOWLTON.
THOS. A. BUFFUM.

Subscribed and sworn to before me this 4th day of April, 1899.

JOHN F. REGAN,
Commissioner of Deeds, City of New York,
Residing in the Borough of Brooklyn.

29

Form No. 419, revised.

United States internal revenue.

Legacies and distributive shares.

(Sections 29 and 30, act of June 13, 1898.)

Schedule of legacies or distributive shares arising from personal property of any kind whatsoever being in charge or trust of Eben J. Knowlton and Thomas A. Buffum, as executors, said property passing from Edwin F. Knowlton, deceased, of the borough of Brooklyn, county of Kings, city and State of New York, who deceased upon the 25th day of October, 1898, to the persons hereinafter mentioned by will; also the amount of such property, together with the amount of duty or tax which has accrued or should accrue thereon, agreeably to the provisions of the internal-revenue laws of the United States, except that we allege and insist that sections 29 and 30 of said act are unconstitutional and void.

Appraised value of personal estate, \$2,624,029.63.

30	Names of persons entitled to beneficial interest in said property.	Relationship of beneficiary to person who died possessed.	Clear value of legacy.	Legacies exempt.	Amount taxable.	Rate for every \$100.	Amount of tax.
	Mary, Countess von Francken Sierstorpff.....	Daughter.					
	Furniture.....						
	Cash legacy.....						
	Income for life on residuary estate, amounting to \$2,348,734.67. Countess Sierstorpff became 28 years of age on July 2, 1898.						
	Present value of her life interest in said residuary estate, estimated according to United States tables, is.....						
	Total.....		\$1,731,996.35		\$1,731,996.35	2.25	38,969.92
	George W. Knowlton.....	Brother.....	100.00		100.00	2.25	2.25
	Charlotte A. Batchelor.....	Sister.....	5,000.00		5,000.00	2.25	112.50
	Eben J. Knowlton.....	Brother.....	100,000.00		100,000.00	2.25	2,250.00
	Unitarian Church of West Upton, Mass.....	None.....	5,000.00		5,000.00	15.	750.00
	The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same of their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is \$717,803.30.....		717,803.30				
	Total.....		\$2,559,899.65		\$1,842,096.35		42,084.67

We, the undersigned executors of the last will and testament and codicil of Edwin F. Knowlton, deceased, do hereby protest against the assessment of tax or duty above set forth or the assessment of any tax or duty upon the personal property of the estate of Edwin F. Knowlton which we have in charge or trust as such executors, or against any of the legacies bequeathed by the said last will and testament and codicil, and we further protest against any proceedings or process against us or either of us or against the personal property in our hands as such executors to enforce the payment or collection thereof upon the following grounds, to wit:

1. The provisions of the act of Congress under which it is sought to impose, assess, and collect the said tax or duty are in violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void.

31 2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if such provisions be not unconstitutional and void.

3. The legacy to Eben J. Knowlton, a brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100, and not at the rate of \$2.25 per \$100, even if said act be not unconstitutional and void.

4. We hereby declare that the rates and amounts of the tax or duty above set down were so set down in the foregoing statement at the direction of the collector of internal revenue for the first district of New York, and we hereby protest against such direction.

Dated at Kings county, N. Y., this 30th day of March, 1899.

(Signed)

EBEN J. KNOWLTON.
THOMAS A. BUFFUM.

We do swear that the above statement is, to the best of our knowledge and belief, just and true, and that we have taken all the means in our power to make it so, except that we allege and insist that sections 29 and 30 of said act are unconstitutional and void.

(Signed)

EBEN J. KNOWLTON,
THOMAS A. BUFFUM,
*Executors of the Last Will and Testament
and Codicil of Edwin F. Knowlton, Dec'd.*

Before me—

JOHN F. REGAN,
*Commissioner of Deeds, City of New York,
Residing in the Borough of Brooklyn.*

[Endorsed:] Form No. 419, revised. Legacy return. First district, New York div., — 189—. Filed M'ch 31, '99. Demand made April 4, '99.

32

EXHIBIT "C."

17. Revised April, 1895.

Notice of and Demand for Taxes Assessed.

United States internal revenue, office of the collector of internal revenue, 1st district.

List of month of Mar., 1899, — div.

STATE OF N. Y., April 12, 1899.

Mr. Eben J. Knowlton :

You are hereby notified that a tax under the internal-revenue laws of the United States, amounting to forty-two thousand eighty-four and $\frac{67}{100}$ dollars, the same being a tax upon legacy Knowlton, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. Demand is hereby made for this tax. This tax is due and payable on or before the 22 day of April, and unless paid within ten days after this notice and demand it will become my duty to collect the same, with a penalty of five per centum additional and interest at one per centum per month.

Payment may be made to me at my office.

(Signed)

FRANK R. MOORE, *Collector.*

Bring this notice with you.

33

EXHIBIT "D."

Estate of EDWIN F. KNOWLTON.

APRIL 12, 1899.

Frank R. Moore, Esq., collector of internal revenue, first district, State of New York.

DEAR SIR : We, the undersigned, executors of the last will and testament and codicil of Edwin F. Knowlton, deceased, hereby acknowledge the receipt of your demand under date of April 12, 1899, notifying us that a tax under the internal-revenue laws of the United States amounting to \$42,084.67, same being a tax upon the legacy—Knowlton—has been assessed against us by the Commissioner of Internal Revenue and transmitted by him to you for collection and demanding the said tax and advising us that it is due and payable on or before the 22d day of April, 1899, and that unless paid within ten days after said notice and demand it will become your duty to collect the same with a penalty of five per centum additional and interest at the rate of one per centum per month.

We, as such executors aforesaid, hereby protest against the said alleged tax and any proceedings upon your part to collect the same, and hereby refuse to pay the said tax upon the following grounds, to wit :

1. The provisions of the act of Congress under which it is sought to impose, assess, and collect the said tax or duty are in violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void, and the said tax is therefore void.

34 2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under said provisions of the said act of Congress, even if said provisions be not unconstitutional and void.

3. The legacy to Eben J. Knowlton, the brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100 and not at the rate of \$2.25 per \$100, even if the said tax be not unconstitutional and void.

Very truly yours, EBEN J. KNOWLTON,
THOS. A. BUFFUM,
*Executors of the Last Will and Testament and Codicil of
Edwin F. Knowlton, Deceased.*

35 EXHIBIT "E."

Internal-revenue service, first district of New York, collector's office.

BROOKLYN, N. Y., April 17, 1899.

Messrs. Eben J. Knowlton and Thomas A. Buffum, executors of the last will and testament of Edwin J. Knowlton, deceased.

GENTLEMEN: I beg to acknowledge the receipt of your letter of April 14th, in which you refuse to pay the tax assessed against the estate of Edward F. Knowlton, amounting to \$42,084.67, which assessment was laid by the Hon. Commissioner in the March list, notice of which, on form 17, was duly served upon you on April 12th.

I have to inform you that section 3187 of the Revised Statutes provides: "If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid by distraint and sale in the manner hereafter provided."

Unless, therefore, the tax, of which you have received notice under date of April 12th, is paid on or before April 22nd, five per centum and interest upon the same will be added thereto and a notice on form 21 of the aggregate amount due will be served
36 upon you, and at the end of ten days from such service, unless the amount claimed therein shall have been paid, distraint warrant will issue and I shall proceed to collect the said sum as provided in section 3187, Revised Statutes, above quoted.

I enclose herewith a copy of the form 21 to which I have referred.

Respectfully,
(Signed)

FRANK R. MOORE, *Collector.*

General Demand for Taxes.

Internal-revenue service, — district of —.

— list.

COLLECTOR'S OFFICE, — —, 189—.

M. — — :

A tax under the internal-revenue laws of the United States, amounting to — ¹⁰⁰ dollars, being for —, has been assessed against you by the Commissioner of Internal Revenue and transmitted by him to me for collection. The same not having been paid within the time required by law, you became liable to pay five per centum additional upon the amount thereof, and interest, at the rate of one per centum per month, from the — day of —, 189—, and demand is hereby made upon you for the said tax, with the additional five per centum, and such interest as may accrue before payment. If not paid within ten days from the personal service or mailing hereof, it will become my duty to collect the same by distraint and sale of property.

Payment may be made to — at —.

Am't of tax... .. \$

Penalty

Total

— —, *Collector.*

Bring this notice with you.

No. 7587. \$42,084.

NEW YORK, April 17th, 1899.

The Central National bank of the City of New York

Pay to the order of Frank R. Moore, collector, forty-two thousand & eighty-four ¹⁷/₁₀₀ dollars.

\$42,084.67.

E. J. KNOWLTON,
THOS. A. BUFFUM,*As Executors of the Last Will and Testament of
Edwin F. Knowlton, Deceased.*

[On the margin:] E. F. Knowlton.

The following words were written across the face of the check :
" Paid upon compulsion and under protest to prevent distraint and penalty." " Certified : Luysly, teller Central nat'l bank. Payable through clearing-house."

EXHIBIT "G."

APRIL 18, 1899.

Estate of EDWIN F. KNOWLTON.

Frank R. Moore, Esq., collector of internal revenue, first district,
State of New York.

DEAR SIR: We, the undersigned executors of the last will and testament and codicil of Edwin F. Knowlton, deceased, hereby acknowledge the receipt of your favor of April 17, 1899, in which you quote the provisions of section 3187 of the Revised Statutes of the United States, and advise us that unless the tax assessed and imposed upon the legacies bequeathed by the said last will and testament and codicil, of which we received notice under date of April 12, is paid on or before April 22, five per centum and interest upon the same will be added thereto, and a notice of form 21 of the aggregate amount due will be served upon us, and at the end of ten days after such service, unless the amount claimed therein shall have been paid, a restraint warrant shall issue, and that you shall proceed to collect the said sum, as provided in section 3187 of the Revised Statutes, and enclosing a copy of the form 21, to which you refer in your letter.

In view of your threat therein contained to collect the said alleged and pretended tax, with the penalty of five per centum additional besides interest, we herewith hand you our certified check as such executors, payable to your order, for the sum of \$42,084.67, under the compulsion of your said threat, and for the purpose of preventing the addition of the five per centum penalty and interest and for the purpose of preventing the issuance of restraint warrant; and we hereby protest against the said tax and against your threat to collect the same by issuance and execution of restraint warrant or other legal process, and hereby make payment of the said alleged tax under protest and upon compulsion of your threat in your said letter of April 17, 1899, contained.

The grounds of our protest against the said payment are as follows:

1. The provisions of the act of Congress under which it is sought to impose, assess, and collect the said tax or duty are in violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void, and the said tax is therefore void.

2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under said provisions of the said act of Congress, even if said provisions be not unconstitutional and void.

3. The legacy to Eben J. Knowlton, the brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100, and not at the

rate of \$2.25 per \$100, even if the said tax be not unconstitutional and void.

(Signed)

EBEN J. KNOWLTON,
THOS. A. BUFFUM,
*Executors of the Last Will and Testament and Codicil
of Edwin F. Knowlton, Deceased.*

41

EXHIBIT "H."

No. 560,856.

(Form No. 1. Revised April 28, 1876.)

Collector's office, United States internal revenue, 1st district of
New York.

BROOKLYN, April 18th, 1899.

Received of estate of Edwin F. Knowlton forty-two thousand
eighty-four & $\frac{67}{100}$ dollars, tax on—

Legacies.....	\$42,084.67
.....	
Unassessed penalty...	
Interest, — years — months.....	

Total.....	\$42,084.67
------------	-------------

said amount of tax being assessed on monthly list for March,
1899.

\$42,084.67.

(Signed)

WILLIAM CADZOW,
Ass't Cashier.

The following words were written across the face of the above :
" Paid under protest. Wm. Cadzow, ass't cashier. John E. Burns,
chief deputy collector, 1st district, Brooklyn."

42

EXHIBIT "I."

(Form 46. Revised June 3, 1880.)

United States internal revenue.

Claim, under series 7, No. 14, for taxes improperly paid.

STATE OF NEW YORK, }
County of Kings, } ss :

Eben J. Knowlton and Thomas A. Buffum, of the borough of
Brooklyn, county of Kings, city and State of New York, being each
for himself duly and severally sworn according to law, does each
for himself depose and say : I am an executor named in the last
will and testament and codicil of Edwin F. Knowlton, late of the
borough of Brooklyn, county of Kings, city and State of New York,
deceased.

The last will and testament of said Edwin F. Knowlton was duly admitted to probate by the surrogate's court of the county of Kings on the fourteenth day of November, A. D. 1898, and upon the same day letters testamentary were issued by and out of said court to me and to my co-executor. On or about the 12th day of April, A. D. 1899, I, as such executor, in conjunction with my co-executor, was assessed by the Commissioner of Internal Revenue an internal-revenue tax of \$42,084.67 as and for an alleged tax or duty assessed or imposed, under and pursuant to the assumed and pretended authority of the provisions of sections 29 and 30 of the act of Congress of June 13, 1898, entitled "An act to provide ways and means
43 to meet war expenditures, and for other purposes," upon the legacies arising from the personal property bequeathed in and by said last will and testament.

After the imposition of the said alleged tax and on or about the 12th day of April, A. D. 1899, Frank R. Moore, Esq., collector of internal revenue, first district, State of New York, did cause to be served upon me and my co-executor a certain notice in writing that the said alleged tax had been assessed against me and my co-executor by the Commissioner of Internal Revenue and transmitted by said Commissioner to said collector for collection, and demanding the said tax and notifying me and my co-executor that the said tax would become due and payable on or before the 22d day of April, and unless paid within ten days it would become his duty to collect the same with a penalty of five per centum additional and interest at one per cent. per month. Thereupon I and my co-executor refused, in writing, to pay the said tax. Thereafter and on the 17th day of April, A. D. 1899, the said Frank R. Moore, Esq., collector, did notify me and my co-executor in writing that unless the said alleged tax should be paid on or before April 22d five per centum and interest upon same would be added thereto and notice of form 21 of the aggregate amount due would be served upon me and my co-executor, and at the end of ten days from such service, unless the amount claimed therein should have been paid, distraint warrant would issue, and that he should proceed to collect the said sum as
44 provided in section 3187 of the Revised Statutes of the United States. Thereafter and on or about the 18th day of April,

A. D. 1899, I, together with my co-executor, did pay the said sum of \$42,084.67 to the said Frank R. Moore, Esq., collector, under protest and for the purpose of preventing the addition of the said penalty of five per centum and the issuance and execution of distraint warrant. The said assessment and payment of the aforesaid alleged tax was, as this deponent verily believes, erroneous and improper, and the said alleged tax was null, void, and of no binding force or effect for the following reasons, namely:

1. The provisions of said sections 29 and 30 of said act of Congress under which the said tax was imposed, assessed, and collected are in violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void.

2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less

than \$10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if said provisions be not unconstitutional and void.

3. The legacy to Eben J. Knowlton, brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100 and not at the rate of \$2.25 per \$100, even if the said act be not unconstitutional and void.

And I now claim that, by reason of the aforesaid erroneous and illegal assessment and payment of the said sum of \$42,084.67,
45 I, together with my co-executor, am justly entitled to have the sum of \$42,084.67 refunded, and I now ask and demand the same, and I further make oath that I have not heretofore presented any claim for the refunding of the above amount or any part thereof.

EBEN J. KNOWLTON.
THOS. A. BUFFUM.

Sworn and subscribed before me this 20th day of April, 1899.

FRED'K H. CHASE,
Notary Public, Kings County.

46 I, Samuel H. Andrews, deputy collector, — division, first district, being duly sworn according to law, depose and say that I have personally investigated the statements made in the within affidavits, and from the best information I can obtain, after careful inquiry, I believe such statements to be in all respects just and true.

SAMUEL H. ANDREWS,
Deputy Collector, — Division, First District.

Sworn to and subscribed before me this 20 day of April, A. D. 1899.

M. L. BAYER, *Dep. Coll.*

Certificate of Clerk in Charge of Records in Office of Commissioner of Internal Revenue.

I hereby certify that from present personal examination I find the sum of — dollars and — cents reported against the said — — on page —, line —, of the list on form —, for —, 18—; also the sum of — dollars and — cents reported against — —, on page —, line —, of the list on form —, for —, 18—, now on file in the office of the Commissioner of Internal Revenue, and that the tax included in the collector's aggregate receipt- for the said list transmitted to the Commissioner of Internal Revenue. Said receipt- amount to \$—.

Dated —, 18—.

— — —,
Clerk in Charge of Records.

Collector's Certificate.

I hereby certify that I have carefully investigated the matters set forth in the within affidavit, and am satisfied that the statements are in all respects just and true; and I further certify, upon personal examination, that I find the sum of forty-two thousand eighty-four dollars and sixty-seven cents reported against the said Eben J. Knowlton and Thomas A. Buffum, executors, on page 2, line 19, of the list on form 23, for March, 1899, and also the sum of — dollars and — cents reported against — —, on page —, line —, of the list on form —, for —, 18—, now on file in my office, and that the same was paid to me on the 18th day of April, 1899, and on 47 the — day of —, 18—, and was included in my aggregate receipts for said lists, the receipts amounting to \$52,895.71 and \$—, respectively, and transmitted to the Commissioner of Internal Revenue, and that no claim for the assessment herein complained of has heretofore been presented. The money herein claimed was not paid on a compromise.

FRANK R. MOORE,
Collector First District, N. Y.

Dated April 20, 1899.

[Endorsed:] (Form 46, revised.) U. S. internal revenue. Claim for refunding taxes collected. No. in district record, —; No. in draft record, —. Eben J. Knowlton, Thos. A. Buffum, claimant. Post-office address, 189 Montague street, room 515. Verified by Frank R. Moore, collector 1st district, N. Y. Assessed upon legacy Knowlton. Basis of claim, not liable. Examined and — —, 18—, by — —.

48

EXHIBIT "J."

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., May 8, 1899.

Frank R. Moore, Esq., collector internal revenue, Brooklyn, N. Y.

SIR: The claim of Eben J. Knowlton and Thomas A. Buffum, executors under the will and testament of Edwin F. Knowlton, late of the borough of Brooklyn, county of Kings, city and State of New York, for the refunding of \$42,084.67, tax paid on legacies, is hereby rejected for the reason that the tax was legally assessed and collected.

Respectfully yours,
(Signed)

G. W. WILSON,
Commissioner.

(Copy.)

49

EXHIBIT "K."

Internal revenue service, first district of New York, collector's office.

BROOKLYN, N. Y., *May 10, 1899.*

Mr. Chas. H. Otis, 189 Montague street, Brooklyn, N. Y.

SIR: I am this morning in receipt of a letter signed by the Hon. Commissioner of Internal Revenue, a copy of which is herewith enclosed.

Respectfully,
(Signed)

FRANK R. MOORE, *Collector.*

Endorsed: Amended complaint. Filed June 1, 1899.

50 United States Circuit Court, Eastern District of New York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of }
and under the Last Will and Testament of Edwin F. Knowlton, }
Deceased, Plaintiffs, }

against

FRANK R. MOORE, as United States Collector of Internal Revenue, }
First District, State of New York, Defendants. }

Please take notice that I appear for the above-named defendant in the above-entitled action, and demand that a copy of all papers and notices in said action be served upon me at my office in the Post-office building, corner of Washington and Johnson streets, in the borough of Brooklyn, New York.

And the clerk of said court will please enter my appearance in this action as the attorney for the said defendant.

Dated Brooklyn, May 26th, 1899.

Yours, &c.,

GEORGE H. PETTIT,

U. S. Attorney for the Eastern District of New York,

51

Post-office Building, Brooklyn, N. Y.

To Charles H. Otis, att'y for plaintiff.

To B. Lincoln Benedict, Esq., clerk.

Endorsed: Notice of appearance. Filed and entered May 26th, 1899.

52 United States Circuit Court, Eastern District, State of New York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Ex- }
ecutors of and under the Last Will and Testa- }
ment of Edwin F. Knowlton, Deceased, Plaintiffs, }

vs.

FRANK R. MOORE, as United States Collector of In- }
ternal Revenue, First District, State of New York, }
Defendant. }

Action No. 1.

The defendant above named, appearing by George H. Pettit, United States attorney for the eastern district of New York, his at-

torney, hereby demurs to the amended complaint herein upon the ground that it appears on the face of said amended complaint that the same does not state facts sufficient to constitute a cause of action.

Dated Brooklyn, New York, June 30th, 1899.

GEORGE H. PETTIT,

*United States Attorney for the Eastern District of
New York, Attorney for Defendant, Federal
Building, Brooklyn, New York.*

Endorsed: Demurrer. Filed July 1st, 1899. Demurrer sustained.
July 12th, 1899. Edward B. Thomas, U. S. J.

53 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the borough of Brooklyn, on the 17th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable Edward B. Thomas, district judge, holding the court.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of and under the Last Will and Testament of Edwin F. Knowlton, Deceased,

vs.

FRANK R. MOORE, as United States Collector of Internal Revenue, First Collection District, State of New York.

This cause coming regularly on for trial upon the demurrer filed July first, 1899, to the amended complaint filed June first, 1899, and after hearing George H. Pettit, Esq., United States attorney for the eastern district of New York, of counsel for defendant, in support of said demurrer, and Charles H. Otis, Esq., of counsel for the plaintiffs, in opposition thereto, and due deliberation having been had thereon, it is—

Ordered that the demurrer interposed by the defendant to the amended complaint in this action, as aforesaid, be, and the same is hereby, sustained; and it is further—

Ordered that the said amended complaint be, and the same is hereby, dismissed with costs to the defendant, to be adjusted in the general manner, and the clerk is hereby directed to enter judgment herein in accordance herewith.

EDWARD B. THOMAS, U. S. J.

Endorsed: Order. Filed and entered 17th day of July, 1899.

54 United States Circuit Court, Eastern District of New York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as
Executors of and under the Last Will and Testa-
ment of Edwin F. Knowlton, Deceased, Plain-
tiffs,

vs.

FRANK R. MOORE, as United States Collector of In-
ternal Revenue, First District, State of New York,
Defendant.

Action No. 1.

The issues in the above-entitled cause having been joined by the defendant filing a demurrer to the amended complaint on the first day of July, 1899, and an order having been entered by the Honourable Edward B. Thomas, district judge, holding the court, on the 17th day of July, 1899, directing that the said demurrer be sustained and dismissing the amended complaint with costs to the defendant, to be taxed, and directing entry of judgment for said costs, and the costs having been taxed by the clerk at the sum of thirteen and $\frac{10}{100}$ dollars (\$13.10)—

Now, on motion of George H. Pettit, Esq., United States attorney, appearing for defendant, it is—

Adjudged that the said demurrer filed in this action by the said defendant to the amended complaint of the plaintiffs herein be, and is hereby, sustained, and that the said amended complaint of the plaintiffs be, and is hereby, dismissed; and it is further—

Adjudged that the above-named defendant recover of the above-named plaintiffs the sum of thirteen and $\frac{10}{100}$ dollars (\$13.10), his costs as taxed, and that judgment be docketed in favor of the said defendant and against the said plaintiffs therefor, and that execution be issued against the said plaintiffs on said judgment.

Dated Brooklyn, July 19th, 1899.

By the court:

(Signed)

B. LINCOLN BENEDICT, *Clerk*.

Endorsed: Judgment. Filed and entered July 19, 1899.

56 Circuit Court of the United States, Eastern District of New York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM,
Executors of and under the Last Will and
Testament of Edwin F. Knowlton, De-
ceased, Plaintiffs,

against

FRANK R. MOORE, as United States Collector
of Internal Revenue, First Collection Dis-
trict, State of New York, Defendant.

Plaintiffs' Petition for
Writ of Error.

And now come Eben J. Knowlton and Thomas A. Buffum, ex-
ecutors of the last will and testament of Edwin F. Knowlton, de-

ceased, and, conceiving themselves aggrieved by the judgment entered herein on the 19th day of July, 1899, do hereby pray that a writ of error be allowed from the said judgment returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

And they present herewith their assignment of errors.

CHAS. H. OTIS,

*Attorney for Plaintiffs in Error, No. 189 Montague Street,
Borough of Brooklyn, City of New York, N. Y.*

And now, to wit, on July —, 1899, it is ordered that the writ of error be allowed as prayed for.

E. H. LACOMBE,

Circuit Judge.

57 Endorsed : Plaintiffs' petition for writ of error. Filed Aug. 7, 1899.

58 Supreme Court of the United States, October Term, 1899.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, Ex- ecutors of and under the Last Will and Testa- ment of Edwin F. Knowlton, Deceased, Plaintiffs in Error,	} Assignment of Errors.
<i>against</i>	
FRANK R. MOORE, as United States Collector of Internal Revenue, First Collection District, State of New York, Defendant in Error.	}

Now come Eben J. Knowlton and Thomas A. Buffum, executors of and under the last will and testament of Edwin F. Knowlton, deceased, by their counsel, and respectfully represent that they feel themselves to be aggrieved by the proceedings and judgment of the circuit court of the United States for the eastern district of New York, in the second judicial circuit, in the above-entitled cause, and assign error thereto as follows:

I. The court erred in holding that sections twenty-nine and thirty of the act of Congress approved July thirteenth, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," which provided for the imposition, assessment, and collection of a tax on the personal property belonging to the estates of decedents when the same exceeded ten thousand
59 dollars in value, were not enacted in violation of article 1, section 9, subdivision 4, of the Constitution of the United States, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken."

II. The court erred in holding that the taxes or duties imposed by the said sections twenty-nine and thirty were uniform throughout

the United States, and therefore were not enacted in violation of article I, section 8, subdivision 1, of the Constitution of the United States, which provides that the Congress shall have power "to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States."

III. The court erred in sustaining the demurrer to the amended complaint.

IV. The court erred in not overruling the demurrer to the amended complaint.

V. The court erred in dismissing the amended complaint and rendering judgment against the plaintiffs.

Wherefore the said Eben J. Knowlton and Thomas A. Buffum, executors of the last will and testament of Edwin F. Knowlton, deceased, plaintiffs in error, pray the honorable court to examine and correct the errors assigned and for a reversal of the judgment
60 of the circuit court of the United States, eastern district, State of New York, entered in the above-entitled cause.

By CHAS. H. OTIS,
Attorney for Plaintiffs in Error.

Endorsed: Assignment of errors. Filed Aug. 7, 1899.

61 Circuit Court of the United States, Eastern District of New York.

EBEN J. KNOWLTON and THOMAS A. BUFFUM, as Executors of
and under the Last Will and Testament of Edwin F. Knowl-
ton, Deceased, Plaintiffs,

against

FRANK R. MOORE, as United States Collector of Internal Revenue,
First Collection District, State of New York, Defendant. }

Know all men by these presents that we, Eben J. Knowlton and Thomas A. Buffum, as executors of and under the last will and testament and codicil of Edwin F. Knowlton, deceased, as principals, and Charles A. Waterbury and Charles L. Hausmann, as sureties, are jointly and severally held and firmly bound unto the above-named Frank R. Moore, as collector of internal revenue, first collection district, State of New York, in the sum of five hundred dollars (\$500), lawful money of the United States of America, to be paid to the said Frank R. Moore, his executors or administrators; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

The condition of the above obligation is such that—

62 Whereas the said Eben J. Knowlton and Thomas A. Buffum, as executors of and under the last will and testament and codicil of Edwin F. Knowlton, deceased, have sued out a writ of error from the Supreme Court of the United States to reverse a judgment rendered and entered by the circuit court of the United States for the eastern district of New York, in the second judicial circuit; which judgment was made and entered in the above-entitled action on the 19th day of July, in the year of our Lord one thousand eight hundred and ninety-nine:

Now, therefore, the condition of the above obligation is such that if the above-named plaintiffs in error herein shall prosecute said writ to effect and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

EBEN J. KNOWLTON [L. S.]
As Executor, &c.
 CHAS. A. WATERBURY. [L. S.]
 CHARLES L. HAUSMANN. [L. S.]
 THOS. A. BUFFUM, [L. S.]
As Executor, &c.

Acknowledged before me by the said Eben J. Knowlton, Charles A. Waterbury, and Charles L. Hausmann this 26th day of July, A. D. 1899.

B. LINCOLN BENEDICT,
U. S. Comm'r.

Acknowledged before me by the said Thomas A. Buffum this twenty-fourth day of July, A. D. 1899.

Witness:

FRANK F. DRESSER,
U. S. Com'r, Mass. District.

Approved, to operate as a supersedeas.

_____,
Circuit Judge.

63 UNITED STATES OF AMERICA, } ss:
Eastern District of New York,

Charles A. Waterbury, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

CHAS. A. WATERBURY.

Sworn to before me this 26 day of July, A. D. 1899.

B. LINCOLN BENEDICT,
U. S. Com'r.

UNITED STATES OF AMERICA, }
Eastern District of New York, } ss:

Charles L. Hausmann, being duly sworn, deposes and says that he is worth the sum of one thousand dollars over and above his just debts and liabilities.

CHARLES L. HAUSMAN.

Sworn to before me this 26 day of July, A. D. 1899.

B. LINCOLN BENEDICT,
U. S. Com'r.

UNITED STATES OF AMERICA, }
Eastern District of New York, } ss:

Be it remembered that on this 26 day of July, in the year of our Lord one thousand eight hundred and ninety-nine, before me, the undersigned, personally came Eben J. Knowlton, Charles A. Waterbury, and Charles L. Hausmann, to me known and known to me to be three of the individuals described in and who executed the foregoing bond, and they severally acknowledged to me that they executed the same for the purposes therein mentioned.

64 In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[L. S.] B. LINCOLN BENEDICT,
U. S. Com'r.

UNITED STATES OF AMERICA, }
District of Massachusetts, } ss:

Be it remembered that on this twenty-fourth day of July, in the year of our Lord one thousand eight hundred and ninety-nine, before me, the undersigned, personally came Thomas A. Buffum, to me known and known to me to be one of the individuals described in and who executed the foregoing bond, and acknowledged to me that he executed the same for the purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[L. S.] FRANK F. DRESSER,
U. S. Commissioner, Mass. District.

Endorsed: Bond on writ of error approved to operate as a supersedeas. E. H. Lacombe, U. S. circuit judge. Filed Aug. 7, 1899.

65 UNITED STATES OF AMERICA, }
Eastern District of New York, } ss:

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, do hereby certify that the foregoing annexed to this certificate is a true copy of the record and of all proceedings in the cause wherein Eben J. Knowlton and Thomas A. Buffum, as executors, &c., are plaintiffs

against Frank R. Moore, as collector, &c., defendant, on file and remaining of record in my office, made up to be transmitted on appeal to the Supreme Court of the United States.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Brooklyn, in the eastern district of New York, this 18th day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

66 This is to certify that the within writ of error was served on the within-named Frank R. Moore, as United States collector of internal revenue, first collection district, State of New York, and on George H. Petit, United States attorney and attorney for said collector, on the 15th day of August, 1899, in their offices, in the United States court-house and post-office building, borough of Brooklyn, State of New York, by showing each of them this original and leaving with each of them a true copy thereof.

CHARLES J. HAUBERT.

U. S. Marshal, E. D. of N. Y.

67 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judge of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Eben J. Knowlton and Thomas A. Buffum, as executors of and under the last will and testament of Edwin F. Knowlton, deceased, plaintiffs in error, and Frank R. Moore, as United States collector of internal revenue, first collection district, State of New York, defendant in error, a manifest error hath happened, to the great damage of the said Eben J. Knowlton and Thomas A. Buffum, executors, &c., of Edwin F. Knowlton, plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days from the date hereof, — to be then and there held, that, the record and proceedings aforesaid
68 being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

Supreme Court of the United States, the 7 day of August, in the year of our Lord one thousand eight hundred and ninety-nine.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT,

*Clerk of the U. S. Circuit Court for the Second
Circuit, Eastern District of New York.*

Allowed by—

E. H. LACOMBE,

U. S. Circuit Judge.

69 [Endorsed:] United States circuit court, eastern district of New York. Eben J. Knowlton and Thomas A. Buffum, as executors, &c., against Frank R. Moore, as collector, &c. Original. Writ of error.

70 This is to certify that the within citation was served on Frank R. Moore, as United States collector of internal revenue, first collection district, State of New York, and George H. Pettit, Esq., United States attorney and attorney for said collector, on the 15th day of August, 1899, in *there* offices, in the U. S. court-house and post-office building, borough of Brooklyn, State of N. Y., by showing each of them this original and leaving with each of them a true copy thereof.

CHARLES J. HAUBERT,
U. S. Marshal, E. D. of N. Y.

71 By the Honorable E. Henry Lacombe, one of the judges of the circuit court of the United States for the eastern district of New York, in the second *district*.

To Frank R. Moore, as United States collector of internal revenue, first collection district, State of New York, and George H. Pettit, Esq., United States attorney and attorney for said collector, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Eben J. Knowlton and Thomas A. Buffum, as executors of and under the last will and testament of Edwin F. Knowlton, deceased, were plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, in the city of New York, in the district above named, this 7th day of August, A. D. 1899, and of the Independence of the United States the one hundred and twenty-fourth.

E. H. LACOMBE,
United States Circuit Judge, Second Circuit.

72 [Endorsed:] United States circuit court, eastern district of New York. Eben J. Knowlton and Thomas A. Buffum, as executor, &c., against Frank R. Moore, as collector, &c. Original. Citation.

73 [Endorsed:] Supreme Court of the United States. Eben J. Knowlton and Thomas A. Buffum, as executors, &c., plaintiffs in error, *vs.* Frank R. Moore, as U. S. collector, &c., defendant. Transcript of record, &c., on writ of error to the circuit court for the eastern district of New York.

Endorsed on cover: File No., 17,501. E. New York C. C. U. S. Term No., 387. Eben J. Knowlton and Thomas A. Buffum, executors of the last will & testament of Edwin F. Knowlton, deceased, plaintiffs in error, *vs.* Frank R. Moore, United States collector of internal revenue, first collection district, State of New York. Filed August 30th, 1899.

110

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. ~~12~~ 225.

SHIRLEY T. HIGH AND JESSIE M. HIGH, APPELLANTS,

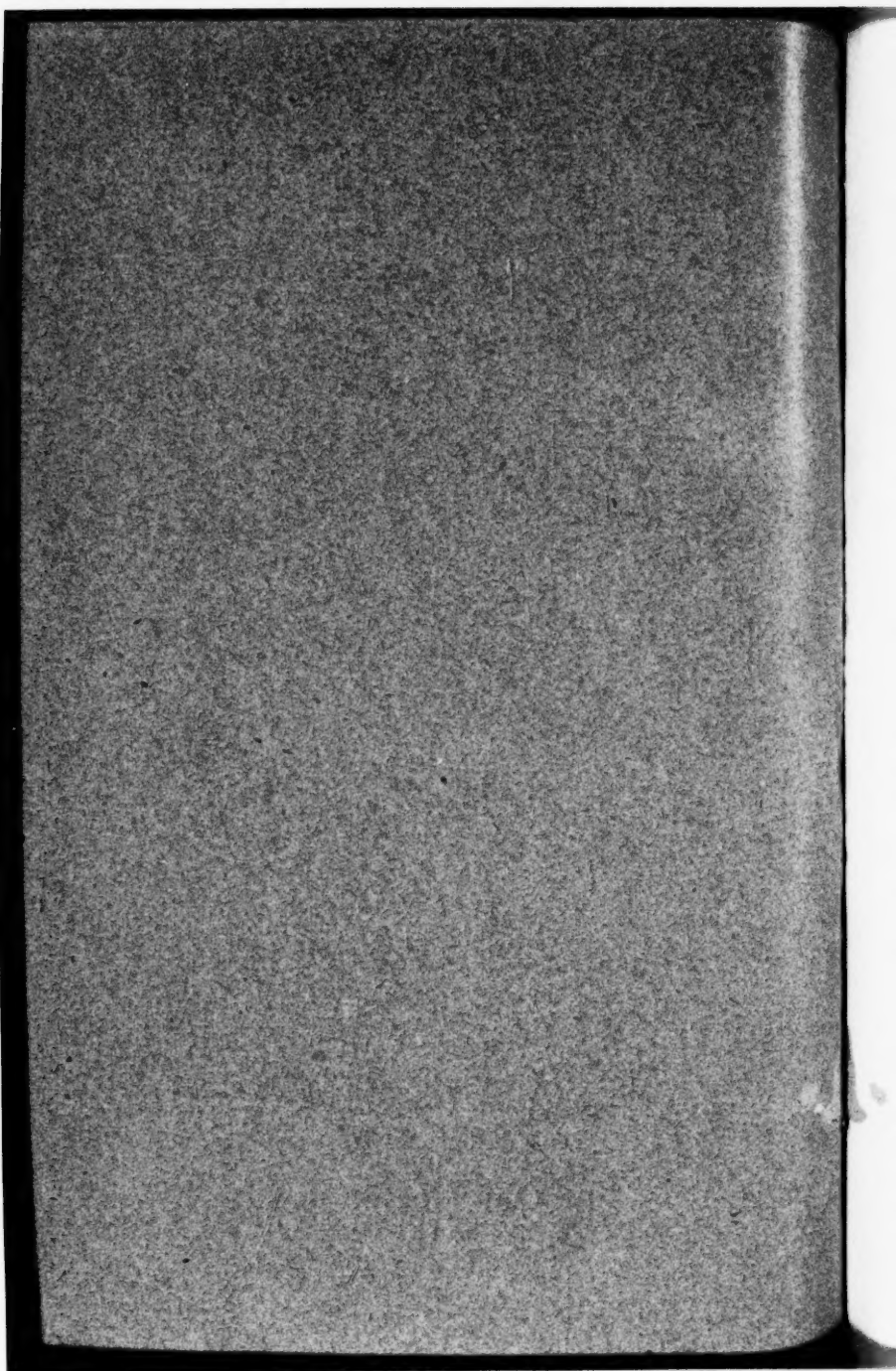
vs.

F. E. COYNE, AS COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, AND ELLEN T. HIGH, AS EXECUTRIX OF JAMES L. HIGH, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED MARCH 4, 1899.

(17,314.)



(17,314.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 729.

SHIRLEY T. HIGH AND JESSIE M. HIGH, APPELLANTS,

vs.

F. E. COYNE, AS COLLECTOR OF UNITED STATES INTERNAL REVENUE FOR THE FIRST DISTRICT OF ILLINOIS, AND ELLEN T. HIGH, AS EXECUTRIX OF JAMES L. HIGH, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, northern division, in chancery sitting, at the United States court-room, in the city of Chicago, in said district and division, before the Hon. William H. Seaman, judge of the district court of the United States for the eastern district of Wisconsin, on Tuesday, the twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety-nine, being one of the regular days of the December term of said court, 1898, and of our Independence the one hundred and twenty-third year.

S. W. BURNHAM, *Clerk*.

SHIRLEY T. HIGH and JESSIE M. HIGH

vs.

FREDERICK E. COYNE, as Collector of United States Internal Revenue for the First District of Illinois, and Ellen T. High, as Executrix of the Last Will and Testament of James L. High.]	}	25091.
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Be it remembered that on this day, to wit, the fourteenth day of February, 1899, came the complainants in said entitled cause, by their solicitors, and filed in the clerk's office of said court their bill of complaint; which said bill of complaint is in the words and figures following, to wit:

2 In the Circuit Court of the United States, Northern District of Illinois, Northern Division. In Chancery.

To the honorable the judges of said court, in chancery sitting:

Your orators, Shirley T. High and Jessie M. High, bring this their bill of complaint against Frederick E. Coyne, as collector of United States internal revenue for the first district of Illinois, and against Ellen T. High, as executrix of the last will and testament of James L. High, deceased, and thereupon your orators show here to the court as follows:

That heretofore and on the third day of October, A. D. 1898, James L. High, the father of your orators, late of the city of Chicago, county of Cook and State of Illinois, died at said city of Chicago, leaving his last will and testament, which said will was duly proved and admitted to probate and record in the probate court of said Cook county on the twenty-eighth day of October, A. D. 1898; that in and by said last will the defendant Ellen T. High is named as sole executrix thereof; that thereafter and on the thirty-first day of October, A. D. 1898, letters testamentary thereunder were issued to her out of said probate court authorizing and empowering her to act as such executrix thereof; that she thereupon qualified as such executrix and entered upon and ever since has been and still

3 is engaged in the performance of her duties as such executrix. Your orators further allege that in and by said last will and testament the said James L. High devised and bequeathed all his property, real and personal, in equal shares to his wife, the said de-

pendant, Ellen T. High, and to your orators, Shirley T. High and Jessie M. High, such provision for said Ellen T. High being in lieu of dower and all other interest in said property.

Your orators further show unto the court that they are citizens of the State of Illinois, & that under and by virtue of said last will and testament they have become and are now seized in fee-simple each of an undivided one-third interest in the following-described real estate situated in said county of Cook and State of Illinois, to wit:

The west twenty-six feet (26 ft.) of the south one hundred feet (100 ft.) of lot number six (6), in block number one hundred and twenty (120), in the School Section addition to Chicago, said premises being otherwise known as lot number nineteen (19) in county clerk's division of block number one hundred and twenty (120) in the School Section addition to Chicago.

Lot fourteen (14), in block five (5), in George Smith's addition to Chicago, said addition being a subdivision of blocks seventeen (17) to twenty-two (22), inclusive, in the assessor's division of the southwest fractional quarter of section twenty-two (22), township thirty-nine (39) north, range fourteen (14) east, of the third principal meridian.

4 The northeasterly one hundred and fifty feet (150 ft.) of block number fifteen (15) and all of block number sixteen (16) of Taylorsport, in the village of Glencoe.

Also that part of the southeast quarter of section number eight (8), township forty-two (42) north, range thirteen (13) east, of the third principal meridian, in the village of Winnetka, which lies north of the center line of Wentworth street extended easterly to Lake Michigan and south to a line extended easterly to Lake Michigan, and lying one hundred and eighty-four and twenty-four one-hundredths feet (184.24 ft.) north of and parallel to the north line of said Wentworth street.

Lots thirty-nine (39) to forty-two (42), inclusive, in Campbell's re-subdivision of block twelve (12), in the east half of the northeast quarter of the northwest quarter of section nine (9), in township thirty-nine (39) north, range thirteen (13) east, of the third principal meridian.

All of said described property being situated in the county of Cook and State of Illinois.

Your orators further allege that they are in full and undisputed possession of all of said above described real estate.

Your orators further show unto the court that the said James L. High left a large amount of personal property, both corporeal and incorporeal, consisting of stocks, bonds, and other choses in action;

5 also household furniture and effects of every sort and description, said personal property being valued at two hundred and fifteen thousand dollars and upward over and above all debts and obligations of said estate.

Your orators further allege that by an act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, it was provided, among other things, as follows:

"Legacies and Distributive Shares of Personal Property."

SEC. 20. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

6 First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of a collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall
7 be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, that all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the

person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall

8 pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector, a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector, and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator or trustee shall
9 refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate, under oath AS

aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such

10 property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate, sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of five hundred dollars: Provided, that in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law have been complied with by the officers of the Government.

SEC. 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this act."

Your orators allege that said act has never been repealed.

11 Your orators further show unto the court that under and by virtue of the alleged authority of said act the said defendant, Frederick E. Coyne, as such collector, as aforesaid, has made a demand in writing upon said defendant, Ellen T. High, requiring and compelling her to make and return to said collector a schedule or statement of the legacies and distributive shares of said estate so held by her as such executrix, stating the names of all persons entitled to any beneficial interest therein and giving the amount of said alleged tax that has accrued and is due thereon; that said collector is threatening, in case said Ellen T. High fails or refuses to make and return such schedule or statement, as aforesaid, that he will make out such list and valuation himself and will assess the tax thereon, and, moreover, that he will commence proceedings in the name of the United States against said executrix as being the person who has such personal property in her actual and constructive possession, and will subject the same to be sold by a decree of court, and that from the proceeds of such sale he will collect the amount of such alleged tax or duty, together with all costs and expenses of such proceeding.

Your orators further allege that said executrix states and gives out that she intends as such executrix to make and return to said collector such schedule or statement of the legacies and distributive shares of said estate so held by her as such executrix, together with the amount of the tax alleged to be due thereon, and threatens and intends and will, unless restrained by an order of this
12 court, pay the amount of said alleged tax to said collector in pursuance of such notice and demand.

Your orators further allege that by the terms and provisions of said act it is provided that such alleged tax or duty shall be a lien or charge for twenty years upon all the property left by any deceased person, where the personal estate left by such decedent is by said act made subject to such tax or duty, unless the same be before that time fully paid and discharged.

Your orators allege that by reason of the terms and language of such provision said tax has become and now is a lien or charge upon the real estate so held by your orators, as aforesaid; that it is a cloud or encumbrance upon their title thereto and interferes with the sale and disposition thereof.

Your orators further represent unto the court that the provisions of said act, as hereinbefore set forth, are unconstitutional, null, and void, in that such tax, being a direct tax in respect of the property upon which said tax is by said act directed to be assessed, is not in and by said act apportioned among the several States, as required by sections 2 and 9 of article I of the Constitution of the United States; that said tax, if not a direct tax, is nevertheless unconstitutional, null, and void, in that it is not uniform throughout the United States; in that said act is an unwarranted interference by the Congress of the United States with the powers and rights

13 of the several States to exercise exclusive control in all matters pertaining to the control and regulation of the devise and descent of property; in that it is an unauthorized assumption

by Congress of powers not conferred upon it by the Constitution of the United States.

Your orators further allege that the threatened action of said collector in making out such lists and valuation, as aforesaid, in case of the failure or refusal of said executrix so to do, and in assessing said tax thereon, and in commencing suit in the name of the United States against said executrix, and in subjecting such property and personal estate to be sold upon a decree of court for the payment of said tax, and said threatened act of said executrix will result in great and irreparable loss and injury to complainants, for which they would and could have no adequate or proper remedy in a court of law.

Forasmuch, therefore, as your orators are without remedy in the premises except in a court of equity, your orators bring this their bill of complaint, and pray that the said Frederick E. Coyne, as collector of United States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of the last will and testament of James L. High, deceased, be made parties defendant to this their bill of complaint; that they and each of them be required to make full, true, direct, and perfect answer unto this bill, but not under oath, their respective answers under oath being hereby expressly waived; that said provisions of said act, as hereinbefore set forth, be declared by this honorable court to be unconstitutional,

14 null, and void, and that the title of your orators to the real estate hereinbefore described be decreed to be free and clear of the lien or charge imposed by said alleged act and from the cloud and encumbrance thereby created; that the defendant Ellen T. High be perpetually enjoined from making or returning to said collector a schedule or statement of said legacies and distributive shares of personal property so held by her as such executrix and from paying such alleged tax thereon; that said Frederick E. Coyne, as such collector, be perpetually enjoined and restrained from collecting or attempting to collect such tax or from commencing any proceeding in any court for the purpose of compelling payment of the same and from doing or committing any of the acts and things so threatened to be done by said collector, as aforesaid, and for such other and further relief as the nature of the case may require and to equity may seem meet.

May it please your honors to grant unto your orators the writ of subpoena issuing out of and under the seal of this honorable court, directed to the proper officer, commanding him that he summon the said defendants, Frederick E. Coyne, as such collector, and Ellen T. High, as such executrix, to appear before this court on the first day of the next term thereof, then and there to answer all and singular the premises and to stand and abide by all orders or decrees that may be entered herein.

And your orators will ever pray, etc.

SHIRLEY T. HIGH.
JESSIE M. HIGH.

PENCE, CARPENTER & HIGH,
Solicitors and of Counsel.

(Endorsed:) Filed February 14, 1899. S. W. Burnham, cl'k.

15 And on the fifteenth day of February, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Hon. William H. Seaman, district judge, appears the following entry, to wit:

Order of February 15, 1899.

SHIRLEY T. HIGH ET AL.	} 25091.
vs.	
FREDERICK E. COYNE ET AL.	

It is ordered by the court that this cause be set down for hearing on demurrer to the bill on February 24, 1899, at two p. m.

16 Afterwards, to wit, on the sixteenth day of February, 1899, came Ellen T. High, as executrix of the last will and testament of James L. High, by her solicitors, and filed in the clerk's office of said court her demurrer to the bill of complaint in said cause; which said demurrer is in the words and figures following, to wit:

17 UNITED STATES OF AMERICA, }
Northern District of Illinois, Northern Division. }

In the Circuit Court of the United States. In Chancery.

SHIRLEY T. HIGH ET AL.	} No. 25091.
vs.	
FREDERICK E. COYNE, Collector, ET AL.	

The demurrer of Ellen T. High, as executrix of the last will and testament of James L. High, deceased, to the bill of complaint of Shirley T. High and Jessie M. High, complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint contained to be true in manner and form as the same are therein set forth, demurs to said bill, and for cause of demurrer shows to the court:

That complainants have not in and by their said bill of complaint made or stated any such case as entitles them to any discovery or relief in equity or to any relief whatsoever against this defendant touching the matters in said bill of complaint contained or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing on the face of said bill of complaint, this defendant demurs to said bill and prays the judgment of this honorable court whether this defendant shall be compelled to make any other or further answer to said bill, and prays to be hence dismissed with her reasonable costs in this behalf sustained.

JOHN F. HOLLAND,
Solicitor for Ellen T. High, Defendant.

18 I certify that, in my opinion, the foregoing demurrer of the defendant Ellen T. High to the bill of complaint of Shirley T. High and Jessie M. High is well founded in law and proper to be filed in the above cause.

JOHN F. HOLLAND,
Solicitor for Defendant Ellen T. High.

STATE OF ILLINOIS, } ss:
Cook County, }

Ellen T. High, being duly sworn, says she is one of the defendants in the above-entitled cause; that she has read the foregoing demurrer to the bill of complaint therein, and that the same is not interposed for the purpose of delaying said suit or any proceedings therein.

ELLEN T. HIGH.

Subscribed and sworn before me this — day of February, A. D. 1899.

[SEAL.]

CHARLES G. LITTLE,
Notary Public.

(Endorsed :) Filed February 16, 1899. S. W. Burnham, cl'k.

19 And on the twenty-fourth day of February, 1899, came Frederick E. Coyne, as collector of United States internal revenue for the first district of Illinois, and filed in the clerk's — of said court his demurrer in said cause; which said demurrer is in words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division. In Chancery.

SHIRLEY T. HIGH ET AL.

vs.

FREDERICK E. COYNE, Collector, etc.

} Demurrer to Bill.

The demurrer of Frederick E. Coyne, as collector of United States internal revenue for the first district of Illinois, to the bill of complaint of Shirley T. High *et al.*, the above-named complainants.

This defendant, by protestation, not confessing any or all of the matters and things in the complainants' bill of complaint contained to be true in such manner and form as the same *is* therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth that the complainants *hath* not in and for their said bill made or stated such a case as entitles them in a court of equity to any discovery from this defendant or *of* any relief against him as to the matters contained in the said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appear-

ing in the said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

S. H. BETHEA,

Attorney for the United States, for the said Defendant.

(Endorsed :) Filed Feb. 24, 1899. S. S. Burnham, clerk.

20 Afterwards, to wit, on the twenty-eighth day of February, 1899, there was filed in the clerk's office of said court an opinion by Judge Seaman; which said opinion is in the words and figures following, to wit:

21

Opinion.

HIGH
vs.
COYNE. }

On demurrer to bill of complaint.

SEAMAN, Judge:

The bill is filed to enjoin the imposition of the succession tax or duty which is provided by sections 29, 30, and 31 of the act of Congress approved June 13, 1898, and is predicated solely upon the alleged unconstitutionality of these provisions. The contention is that the tax or duty is opposed to the Constitution upon the following grounds: (1) That it constitutes a direct tax upon the legacies in question, both in effect and by the express terms of the act; (2) that it is not uniform for the reason that it exempts from its operation all legacies under the value of \$10,000; and (3) that the right of inheritance is a privilege or franchise within the exclusive power of the States to grant and regulate and not subject to abridgement or taxation by the General Government. Unless one or the other of these propositions can be upheld, it is manifest that the bill states no ground for relief and the demurrer must be sustained. The questions are interesting, and the ability and thoroughness with which they have been presented would justify a review of the authorities cited and an extended statement of the grounds upon which my conclusions are based, aside from the doctrine of *stare decisis*; but, with the pressure of other duties and the belief that there will be a review by the Supreme Court, I am satisfied that an early decision is more desirable for the parties than an opinion which would necessarily call for delay.

22 It is the duty of the courts to sustain all enactments by the legislative branch of the Government, either national or State, unless they clearly transcend the law-making power, and no such enactment must be held for nought because of doubt or for any reason short of absolute conviction. Another rule must be

premised as controlling the circuit courts at least; that individual convictions must yield when the constitutionality has been determined by the court of final resort in a case which is applicable.

I have examined with care the line of decisions by the Supreme Court upon questions of taxation in which the constitutional provisions involved in this case were interpreted, and my conclusions, briefly stated, are as follows:

1. Prior to the income-tax decisions in the Pollock cases (157 and 158 U. S.) the opinions of the Supreme Court tended to narrow the definition of direct taxes, which were inhibited by the Constitution to capitation or poll taxes and taxes on land. By the Pollock case that definition was extended to include personalty and incomes derived from investment in real estate or personal property. It is unnecessary to review the definitions which are there considered, as it seems manifest that the prevailing opinion by the Chief Justice carefully preserves the distinction theretofore held to authorize the duty or tax which is in question here as one upon the privilege of succession or upon devolution of property of the nature of excise. Certainly the decision in *Scholey v. Rew*, 23 Wall., 331, by which a provision was sustained quite identical in terms, so far as material to this point, was neither overruled nor questioned in the Pollock decision, but it stands unimpaired as a rule of decision which

23 must govern this court, notwithstanding the reference in the opinion to the former income tax as of analogous nature.

The view thus indicated of the distinction in an inheritance or succession tax is well fortified by the opinion in *United States v. Perkins*, 163 U. S., 625, which sustains a tax of that species charged under a statute of the State of New York against a legacy in favor of the United States bequeathed by a citizen of that State. As there held, "The tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee." So in *Magoun v. Ill. Trust & Savings Bank*, 170 U. S., 283, the same interpretation is upheld.

2. As an original question, the objection of want of uniformity through the important exemption feature of this statute would impress me as one of great force; but in consideration of the fact that the same question was directly presented in the income-tax cases and was left undecided because of an equal division of the members of the court, and in the light of rulings under State statutes where the objection would seem to be equally open under certain of their constitutions, I am unable to hold that the provision is undoubtedly beyond the power of Congress.

3. Upon the last proposition I cannot regard the duty as an interference with the rights of the States, although the doctrine frequently pronounced that the right to tax is the right to destroy lends plausibility to the contention here.

I am therefore of opinion that the demurrer must be sustained upon authority.

(Endorsed :) Filed February 28, 1899. S. W. Burnham, clerk.

24 On the same day, to wit, the twenty-eighth day of February, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause before the Hon. William H. Seaman, district judge, appears the following entry, to wit:

25 *Order.*

Circuit Court of the United States, Northern District of Illinois,
Northern Division.

TUESDAY, February 28, 1899.

Present: Hon. William H. Seaman, district judge.

SHIRLEY T. HIGH and JESSIE M. HIGH	} 25091.
<i>vs.</i>	
FREDERICK E. COYNE, as Collector of the United States Revenue for the First District of Illinois, and Ellen T. High, as Executrix of the Last Will and Testament of James L. High, Deceased.	

Now come the parties, by their solicitors, and the court, having considered and being now fully advised, sustains the demurrers to the bill, and the complainants in open court, by their solicitors, elect to abide by their bill.

It is thereupon ordered by the court that the bill of complaint be, and the same is hereby, dismissed for want of equity at the complainants' costs, and that execution issue therefor.

The bond on appeal is fixed at the sum of three thousand dollars, to be approved by the court; which bond when approved and filed shall operate as a supersedeas.

26 And on the first day of March, 1899, came the complainants in said entitled cause, by their solicitors, and filed in the clerk's office of said court their petition for appeal and assignment of errors; which said petition for appeal and assignment of errors are in words and figures following, to wit:

Petition for Appeal and Assignment of Errors.

UNITED STATES OF AMERICA,
Northern Division of the Northern District of Illinois, } *ss:*

In the Circuit Court of the United States.

SHIRLEY T. HIGH ET AL.	} In Chancery.
<i>vs.</i>	
FREDERICK E. COYNE ET AL.	

Petition for appeal and assignment of errors.

And now come the complainants, Shirley T. High and Jessie M. High, by Pence, Carpenter & High, their solicitors, and pray an

appeal to the Supreme Court of the United States from the decree and order of his honor Judge W. H. Seaman dismissing the bill of complaint herein for want of equity, entered on the twenty-eighth day of February, A. D. 1899, and assign the following errors and reasons for appeal :

1st. That the circuit court erred in dismissing the said bill of complaint.

2nd. That the circuit court erred in holding that the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, A. D. 1898, is valid in so far as it provides for the taxing of legacies and distributive shares of personal property in sections 29, 30, and 31, inclusive.

3rd. That the circuit court erred in not deciding that the Congress of the United States by said act, in so far as it relates in sections 29, 30, and 31 to legacies and distributive shares of personal property, deprived the complainants of their property without due process of law.

4th. That the circuit court erred in deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is uniform and affords the equal protection of the laws to persons throughout the jurisdiction of the United States.

5th. That the circuit court erred in deciding that the Congress of the United States by said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, has not denied and does not deny to persons throughout the United States and within the jurisdiction of the United States the equal protection of the laws.

6th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, denies to the said complainants, who are citizens of the United States, the equal protection of the laws.

7th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, abridges, interferes with, and controls the privileges of the complainants, who are citizens of the United States and of the State of Illinois, which said privileges are guaranteed to said complainants by the said State of Illinois.

8th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal —, and in sections 29, 30, and 31, abridges the immunities of the complainants, who are citizens of the United States and of the State of Illinois.

9th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is repugnant to, in conflict with, and in violation of the provisions of sections 2 and 9 of article 1 of the Constitution of the United States.

10th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is repugnant to, in conflict with, and in violation of the provision of the fourteenth article of amendment to the Constitution of the United States of America.

11th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is the exercise by Congress or the attempted exercise by Congress of a power not conferred upon it by the Constitution of the United States.

12th. That the circuit court — in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is an unwarranted interference by Congress with the substantive powers of the several States and of the State of Illinois to regulate and control the devise and descent of property within said States and within the State of Illinois.

29 13th. That the circuit court erred in not deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is a direct tax, and as such was not levied in accordance with section 2 of article 1 of the Constitution of the United States.

14th. That the circuit court erred in not holding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, was not levied in accordance with section 9 of article 1 of the Constitution of the United States.

15th. That the circuit court erred in not holding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is not uniform, as required by section 8 of article 1 of the Constitution of the United States.

16th. The circuit court erred in not holding that the right to control or regulate the devise and descent of property is vested alone in the several States, and that the Congress of the United States has no right or power to regulate, control, or abridge the devise or descent of property within the several States and within the State of Illinois.

17th. That the circuit court erred in not deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is an attempt by the Congress of the United States to regulate, control, or abridge the right of inheritance of property which has been guaranteed to the complainants by the State of Illinois, and which attempted act is prohibited by the Constitution of the United States.

30 18th. The circuit court erred in deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, was not a direct tax.

19th. The circuit court erred in deciding that said act, in so far

as it relates to legacies and distributive shares of property, and in sections 29, 30, and 31, is not repugnant to, in conflict with, and prohibited by section 2 of article 1 of the Constitution of the United States.

20th. The circuit court erred in deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is not repugnant to, in conflict with, and in violation of section 9 of article 1 of the Constitution of the United States.

21st. The circuit court erred in deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is not repugnant to, in conflict with, and in violation of section 8 of article 1 of the Constitution of the United States.

22nd. The circuit court erred in deciding that said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, was not repugnant to, in conflict with, and in violation of the provision of the fourteenth article of amendment to the Constitution of the United States.

23rd. The circuit court erred in deciding that it was within the power of Congress to levy a succession tax which was not apportioned among the several States in accordance with section 2 of article 1 of the Constitution of the United States.

24th. That the circuit court erred in not granting the relief prayed for in said bill of complaint.

31 25th. That the circuit court erred in not deciding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is in conflict with and in violation of other provisions of the Constitution of the United States.

26th. That the circuit court erred in that said decree dismissing said bill of complaint for want of equity is contrary to the law, and that the action of the court in sustaining the demurrers to said bill was unwarranted, because such action of the court was based upon an act of Congress which is repugnant to, in conflict with, and in violation of the provisions of the Constitution of the United States.

27th. That the circuit court erred in holding that the said act, in so far as it relates to legacies and distributive shares of personal property, and in sections 29, 30, and 31, is a tax upon the right or privilege of inheritance and not a tax upon the property inherited itself.

PENCE, CARPENTER & HIGH,
Sol'rs for Complainants.
SHIRLEY T. HIGH.
JESSIE M. HIGH.

(Endorsed :) Filed Mar. 1, 1899. S. W. Burnham, clerk.

32 On the same day, to wit, the first Jay of March, 1899, came the complainants in said entitled cause, as principals, and Henry Borsch, as surety, and filed in the clerk's office of said court

a certain appeal bond; which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Shirley T. High and Jessie M. High, as principals, and Henry Borsch, as surety, are held and firmly bound unto F. E. Coyne, as collector of United States internal revenue for the first district of Illinois, and unto Ellen T. High, as executrix of and under the last will and testament of James L. High, deceased, in the full and just sum of three thousand dollars (\$3,000.00), to be paid to the said F. E. Coyne and to the said Ellen T. High, their successors and certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at a term of the circuit court of the United States in and for the northern district of Illinois, northern division, in a suit depending in said court between the said Shirley T. High and the said Jessie M. High, as complainants, and the said F. E. Coyne and the said Ellen T. High, as defendants, a decree was rendered against the said Shirley T. High and the said Jessie M. High, and the said Shirley T. High and the said Jessie M. High having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a
33 citation directed to the said F. E. Coyne and the said Ellen T. High, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Shirley T. High and the said Jessie M. High shall prosecute said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SHIRLEY T. HIGH. [SEAL.]
JESSIE M. HIGH, [SEAL.]
By S. T. HIGH, *Her Att'y-in-fact.*
HENRY BORSCH. [SEAL.]

Approved as a supersedeas bond.

WM. H. SEAMAN, *Judge.*

(Endorsed:.) Filed March 1, 1899. S. W. Burnham, clerk.

34 On the same day, to wit, the first day of March, 1899, in the December term of said court, 1898, in the record of proceedings thereof in said entitled cause, before the Honorable William H. Seaman, district judge, appears the following entry, to wit:

SHIRLEY T. HIGH and JESS-E M. HIGH

vs.

FREDERICK E. COYNE, as Collector of the United States Internal Revenue for the First District of Illinois, and Ellen T. High, as Executrix of the Last Will and Testament of James L. High. } 25091.

Now comes the said complainants, by their solicitors, and present to the court their petition for appeal to the Supreme Court of the United States from the decree and order entered herein on the 28th day of February, A. D. 1899, dismissing their said bill of complaint, and also present and file their assignments of error. The court now, being fully advised in the premises, doth order that said appeal be, and the same is hereby, granted and allowed to the Supreme Court of the United States.

35 On the same day, to wit, the first day of March, 1899, in the December term of said court, 1898, in the record and proceedings thereof in said entitled cause, before the Hon. William H. Seaman, district judge, appears the following entry, to wit:

SHIRLEY T. HIGH and JESSIE M. HIGH

vs.

FREDERICK E. COYNE, as Collector of United States Internal Revenue for the First District of Illinois, and Ellen T. High, as Executrix of the Last Will and Testament of James L. High. } 25091.

Now come the complainants and present their bond on appeal in the sum of three thousand dollars, with Henry Borsch as surety, which bond is now by the court approved, to operate as a supersedeas.

It is further ordered, upon motion of complainants, that the name of Frank E. Coyne in the records of this court in this cause be changed to Frederick E. Coyne.

36 NORTHERN DISTRICT OF ILLINOIS, } ss:
Northern Division,

I, S. W. Burnham, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause entitled Shirley T. High and Jessie M. High vs. Frederick E. Coyne, as collector of United States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of the last will and testament of James L. High, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Chicago, in said district, this first day of March, 1899.

Seal of Circuit Court U. S.,
Northern Dist. Illinois,
1855.

S. W. BURNHAM, Clerk.

37 UNITED STATES OF AMERICA, 82 :

To F. E. Coyne, as collector of United States internal revenue for the first district of Illinois, and to Ellen T. High, as executrix of and under the last will and testament of James L. High, deceased, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a- appeal from the circuit court of the United States for the northern district of Illinois, Northern division, wherein Shirley T. High and Jessie M. High are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. H. Seaman this 1st day of March, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

WM. H. SEAMAN, *Judge*.

38 [Endorsed:] No. 25091. Supreme Court of the United States. Shirley T. High *et al. vs.* F. E. Coyne, collector, *et al.* Citation.

The undersigned hereby accept service of the within citation and the delivery of a true copy thereof this twenty-eighth day of February, A. D. 1899.

FREDERICK E. COYNE,
By S. H. BETHEA, *His Solicitor*.
ELLEN T. HIGH,
By JOHN F. HOLLAND, *Her Solicitor*.

Endorsed on cover: File No., 17,314. N. Illinois C. C. U. S. Term No., 729. Shirley T. High and Jessie M. High, appellants, *vs.* F. E. Coyne, as collector of United States internal revenue for the 1st district of Illinois, and Ellen T. High, as executrix of James L. High, dec'd. Filed March 4th, 1899.



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OTOMERIS TERM, 1900.

No. 451

THE FIDELITY INSURANCE TRUST AND SAFE DEPOSIT
COMPANY, EXECUTOR UNDER THE WILL OF DANIEL
CRAIG, DECEASED, PLAINTIFF IN ERROR.

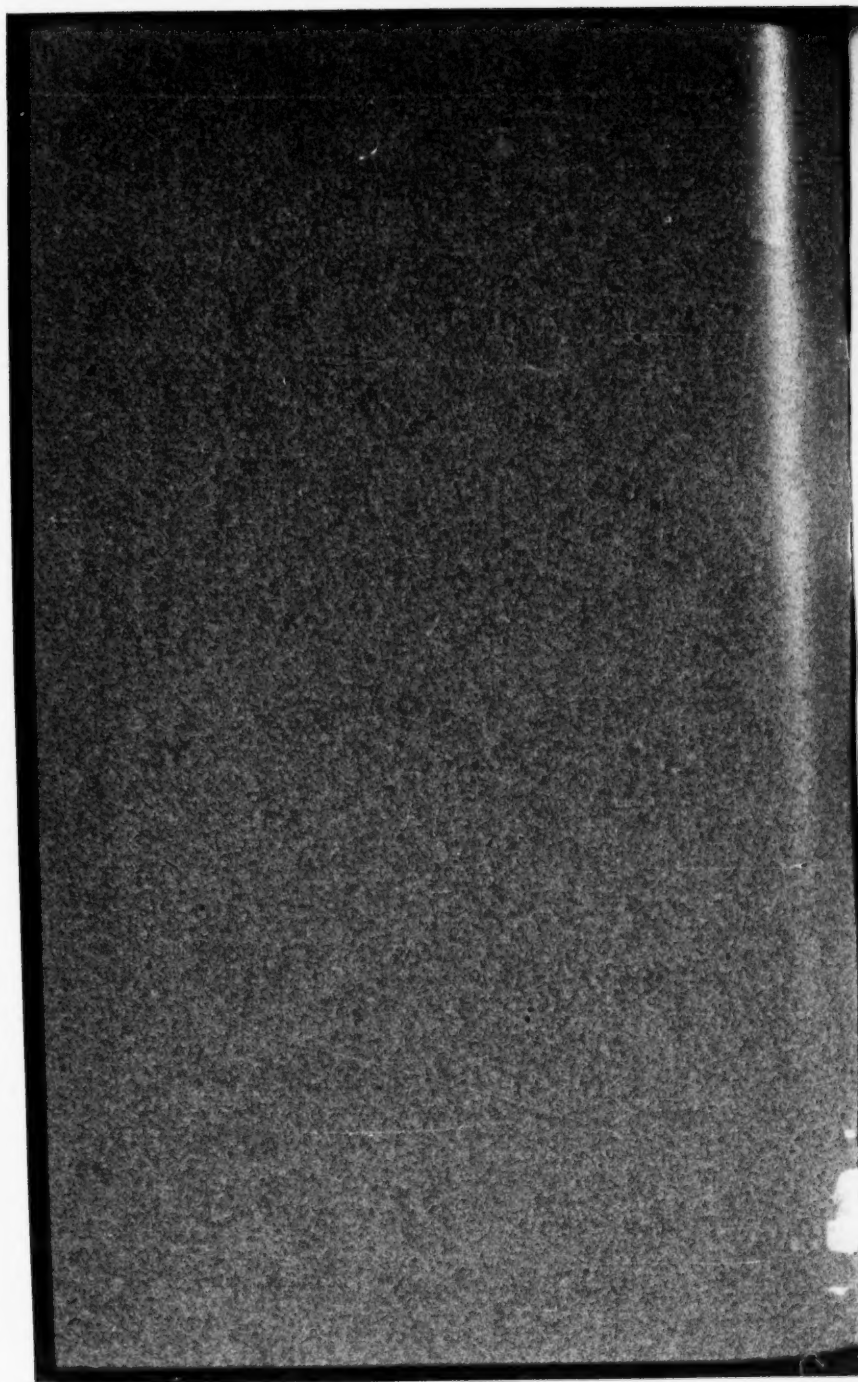
vs.

PENROSE A. MOLAIN

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

FILED NOVEMBER 17, 1900.

(17,565.)



(17,565.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 451.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
COMPANY, EXECUTOR UNDER THE WILL OF DANIEL
CRAIG, DECEASED, PLAINTIFF IN ERROR,

vs.

PENROSE A. McCLAIN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

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1

October Session, 1899.

FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
Company, Executor under the Will of Daniel
Craig, Dec'd,

vs.

PENROSE A. MCCLAIN, Collector of Internal Revenue
for the First Collection District of Penn-
sylvania.

2. Certiorari.

R. C. Dale. James M. Beck.

1899, Sep. 13. Petition of defendant filed. Certiorari for the removal of the case from the court of common pleas No. 2 for the county of Philadelphia to this court allowed and issued.

" " 14. Certiorari returned & filed with record annexed.

" " 15. Plea filed.

" Nov. 11. Order allowing defendant to withdraw plea and file demurrer.

" " 11. Demurrer to statement filed.

" " 13. Argued surdemurrer.

" " 13. Opinion Dallas and McPherson, JJ., sustaining demurrer to plaintiff's statement and directing judgment to be entered for defendant. Judgment accordingly.

2

1899, Nov. 13. Assignments of error filed.

" " 13. Petition for writ of error to Supreme Court of the United States filed and allowed.

" " 13. Writ of error issued and copy lodged in clerk's office for adverse party.

" " 13. Citation allowed and issued.

" " 13. Citation returned, service accepted.

3

UNITED STATES,
Eastern District of Pennsylvania, } set:

The President of the United States to the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, Greeting:

Because that in the record and process and also in the rendering of judgment in a suit before you between The Fidelity Insurance, Trust and Safe Deposit Co., executor, plaintiff, and Penrose A. McClain, defendant, in a plea of assumpsit, a manifest error has intervened, to the great damage of the said The Fidelity Insurance, Trust and Safe Deposit Co., executors, as in its complaint has been stated, and as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are

hereby commanded that if judgment thereof be given then, under your seal, you do, distinctly and openly, send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the honorable the justices of the Supreme Court of the United States, sitting at Washington, D. C., on the second Monday of October next, that, the record and process aforesaid being inspected, they may cause to be done thereupon what of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this 13th day of November, A. D. one thousand eight hundred and ninety-nine, and in the one hundred and twenty-fourth year of the Independence of the said United States.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

SAMUEL BELL,
Clerk of Circuit Court U. S.

4 UNITED STATES OF AMERICA, ss :

The President of the United States to Penrose A. McClain, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the third circuit, to be holden at the city of Philadelphia, within thirty days, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, eastern district of Pennsylvania, wherein The Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Dallas, judge of the circuit court of the United States, this 13th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

GEO. M. DALLAS, *Cir. Judge.*

Service accepted.

JAMES M. BECK, *U. S. Att'y.*

5 In the Circuit Court of the United States, Eastern District of Pennsylvania.

THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO., Executor }
under the Will of Daniel Craig, Deceased, }
vs. }
PENROSE A. MCCLAIN.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1899, No. 2.

It is thus contained:

Be it remembered that on the 13th day of September, A. D. 1899, James M. Beck, Esq., attorney of the United States for the eastern district of Pennsylvania, comes into court here and presents the petition of Penrose A. McClain for the removal of the cause
6 from the court of common pleas No. 2 for the county of Philadelphia, State of Pennsylvania; which said petition, being filed, is in the words and of the tenor following, to wit:

7 Circuit Court of the United States, Eastern District of Pennsylvania.

The petition of Penrose A. McClain, collector of internal revenue for the first collection district of Pennsylvania, respectfully represents:

That this suit is commenced by summons against him as defendant by the Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, deceased, in the court of common pleas No. 2 for the county of Philadelphia, State of Pennsylvania, to June term, 1899, No. 1212.

That the said suit is brought on account of an act done by the said Penrose A. McClain under the revenue laws of the United States as collector of internal revenue for the first collection district of Pennsylvania, the said suit being brought to recover a certain sum of money paid for and on account of the said plaintiff to the said Penrose A. McClain as collector, as aforesaid, as internal-revenue taxes.

Your petitioner respectfully prays that the said cause may be entered on the docket of your honorable court and proceeded in as a cause therein originally commenced, and that a writ of certiorari be immediately issued by the clerk of your honorable court to the
8 said court of common pleas No. 2 for the county of Philadelphia, to send to the said circuit court of the United States for the eastern district of Pennsylvania the record and proceedings in said cause, according to the provisions of the act of Congress in such case made and provided.

And he will ever pray, &c.

PENROSE A. MCCLAIN.

Penrose A. McClain, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

PENROSE A. McCLAIN.

Sworn and subscribed before me this twelfth day of September, A. D. 1899.

ARMON D. ACHESON,

[SEAL.]

Notary Public.

I hereby certify that as attorney for the above-named petitioner I have examined the proceedings against him, and have carefully inquired into all the matters set forth in the above petition, and that I believe the same to be true.

JAMES M. BECK,

United States Attorney, Attorney for Petitioner.

9 Endorsed: U. S. circuit court, Oct. sess., 1899, No. 2. Fidelity Ins., Trust & Safe Deposit Co., executor, etc., *vs.* Penrose A. McClain, collector. Petition for certiorari. Filed Sep. 13, 1899. Samuel Bell, clerk. H. R. James M. Beck, U. S. attorney, att'y for petitioner.

10

Exemplification.

PHILADELPHIA COUNTY, }
State of Pennsylvania, } *set:*

Among the records and proceedings of the court of common pleas No. two for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record at No. 1212, June term, 1899, to wit:

Docket Entries.

June Term, 1899.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT CO.,
Executors under Will of Daniel Craig, Dec'd,
vs.
PENROSE A. McCLAIN. } 1012.

R. C. Dale.

Aug. 29, 1899.—Statement and rule to file aff't of defence filed.

Sept. 1, 1899.—Aff't of service of copy of statement and rule to file aff't of defence, Aug. 29, 1899, filed.

Sums. assumpsit exit Aug. 29, 1899; ret. 1 Mon., Sep., '99; served Sept. 13, 1899.

Certiorari from circuit court of United States for E. D. of Pa. of Oct. sess., 1899, No. 2, bro't into office.

11

C. P. No. 2, June Term, 1898.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
Company, Executor under the Will of Daniel Craig,
Deceased,

No. —.

vs.

PENROSE A. MCCLAIN.

Issue summons assumpsit as above, returnable the first Monday
of September next.

R. C. DALE,

Att'y for Pctff.

8, 29, '99.

To the proth'y.

Endorsed: C. P. No. 2, June term, 1899. The Fidelity Ins.,
Trust & Safe Deposit Co., executor under the will of Daniel Craig,
dec'd, vs. Penrose A. McClain. Precipe. Assumpsit. Filed Aug.
29, 1899. Hunter, pro proth'y. R. C. Dale.

12

Summons.

COUNTY OF PHILADELPHIA, ss.:

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of the
county of Philadelphia, Greeting:

We command you that you summon Penrose A. McClain, late of
your county, so that he be and appear before our judges, at Phil-
adelphia, at our court of common pleas No. 2 of the county of Phil-
adelphia, to be holden at Philadelphia, in and for said county, on
the first Monday of September next, there to answer the Fidelity
Insurance, Trust and Safe Deposit Company, executor under the
will of Daniel Craig, deceased, of a plea of assumpsit, and to have
you then and there this writ.

Witness the Honorable Samuel W. Pennypacker, president judge
of our said court, at Philadelphia, the 29th day of August, in the
year of our Lord one thousand eight hundred and ninety-nine
(1899).

J. N. S. HUNTER,

Pro Prothonotary.

Endorsed: 1212, June term, 1899, court of common pleas
13 No. 2. The Fidelity Ins., Trust & Safe Deposit Co., exec-
utor under the will of Daniel Craig, dec'd, vs. Penrose A.
McClain. Summons. Assumpsit. Paid. R. C. Dale.

Served Penrose A. McClain by giving to him August 29th, 1899,
a true and attested copy of the within writ and making known to
him the contents thereof.

So answers—

GEO. K. HOGG, *Deputy Sheriff.*ALEXANDER CROW, JR., *Sheriff.*

14

C. P. No. 2, June Term, 1899.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COM- pany, Executor under the Will of Daniel Craig, vs. PENROSE A. MCCLAIN.	}	1212.
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Statement of Plaintiff's Demand.

This action is brought by the plaintiff, The Fidelity Insurance, Trust and Safe Deposit Company, against the defendant, Penrose A. McClain, to recover the sum of one hundred and sixty eight ⁷⁵/₁₀₀ dollars (\$168.75), with interest from the 9th day of May, 1899; which sum the plaintiff doth aver is justly due and owing to it upon the following cause of action:

The defendant, Penrose A. McClain, is collector of the United States internal revenue for the first district in the State of Pennsylvania; that on the 29th day of April, 1899, the said defendant, acting as collector of internal revenue, did serve a notice upon the plaintiff, notifying the plaintiff that a tax had been assessed against it as executor of the estate of Daniel Craig, deceased, under the provisions of an act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved the 13th day of June, 1898, and that the amount of said tax so assessed was \$168.75; that in consequence of said assessment

15 and to avoid the pains and penalties imposed by law for default in making payment of any taxes so assessed the plaintiff did on the 9th day of May, 1899, make payment to the said Penrose A. McClain of the amount of the tax so assessed, said payment being made under protest, which protest was at the time of said payment made by a writing of which a copy is hereunto annexed as "Exhibit A," and that thereupon the plaintiff, pursuant to the provisions of the act of Congress in such case made and provided, did make a claim for the refunding of said tax, which said claim made in writing of which a copy is hereunto annexed as "Exhibit B" was filed with the said defendant on the 9th day of May, 1899, but notwithstanding said application for the refunding of said tax, which was duly presented to the Commissioner of Internal Revenue of the United States, said Commissioner of Internal Revenue did reject said application for refunding and did give to the plaintiff notice of his action by a writing of which a copy is hereto annexed as "Exhibit C," and the plaintiff is advised by counsel and doth aver that the tax so assessed against the plaintiff and payment of which was exacted by the defendant of the plaintiff was unlawfully assessed and exacted, because the plaintiff doth aver that the act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, under which said tax was assessed, is unconstitutional in so far as its provisions relate to the taxation of legacies and distributive shares of personal property, in that in the sections

16 of said act relating to said subject the provisions of the Constitution of the United States have been disregarded as follows:

(a.) Article I, section 8, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Notwithstanding which said constitutional requirement, the taxes and excises provided in said statute upon legacies and distributive shares of personal property are not uniform.

(b.) Article I, section 2, paragraph 3, of the Constitution:

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

And the plaintiff doth further aver that notwithstanding the demand made for the refunding of said tax, as aforesaid, said defendant has neglected and refused to refund the same.

Wherefore the plaintiff brings suit.

RICHARD C. DALE,
Att'y for the Plaintiff.

17 STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss :

H. Gordon McCouch, being duly sworn according to law, doth depose and say: I am the secretary of The Fidelity Insurance, Trust and Safe Deposit Company, the plaintiff in the above cause. The averments contained in the foregoing statement of plaintiff's demand are just and true, as I verily believe.

H. GORDON MCCOUCH.

Sworn and subscribed to before me this 29th day of August, 1899.

JOS. McMORRIS,
Notary Public.

[SEAL.]

18 "EXHIBIT A."

MAY 9TH, 1899.

P. A. McClain, Esq., collector United States internal revenue, first district, State of Pennsylvania.

SIR: Pursuant to notice served upon us from you, under date of April 29, 1899, informing us that a tax under the internal-revenue laws of the United States, amounting to \$168.75, has been assessed upon us by the Commissioner of Internal Revenue and transmitted to you for collection, we hereby make payment to you of the amount so assessed: but in making said payment do so under protest, upon the ground that the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, under which said tax has been assessed, is unconstitutional, in that it disregards the provisions—

(A) of article 1, § 8, of the Constitution of the United States, which reads as follows :

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Notwithstanding which said constitutional requirements, the taxes and excises provided in said statute upon legacies and distributive shares of personal property is not uniform.

(B.) Said act of Congress before mentioned is also in disregard of article 1, § 2, par. 3, of the Constitution of the United States, which provides that "representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

Wherefore, in making this payment under protest, the undersigned gives notice of an intention to take such steps as may be provided by law for the recovery of the same.

Very respectfully,

H. G. McCOUCH, *Secretary.*

20

"EXHIBIT B."

STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss :

H. G. McCouch, of the city of Philadelphia and State and county aforesaid, being duly sworn according to law, deposes and says that he is the secretary of the Fidelity Insurance, Trust & Safe Deposit Co., executor under the will of Daniel Craig; that upon the 29th day of April, A. D. 1899, they were assessed an internal-revenue tax of one hundred and sixty-eight $7\frac{5}{8}$ dollars, being tax upon the estate of Daniel Craig under the act of June 13, 1898, which amount they afterwards, on the 9th day of May, A. D. 1899, paid to P. A. McClain, Esq., collector of internal revenue for the first district of Pennsylvania, which amount, as this deponent verily believes, should be refunded for the following reasons, viz :

The act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, under which said tax has been assessed, is unconstitutional in that it disregards the provisions—

(a.) of article 1, sec. 8, of the Constitution of the United States, which reads as follows : "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States, but all duties, imposts and excises shall be uniform throughout the United States." Notwithstanding which said constitutional requirement the taxes and excises provided in said statute upon legacies and distributive shares of personal property is not uniform.

(b.) Said act of Congress before mentioned is also in disregard of article 1, section 2, par. 3, of the Constitution of the United States, which provides that "representative and direct taxes

21

shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

And this deponent now claims that by reason of the payment of the said sum of one hundred and sixty-eight $\frac{7}{10}$ dollars they are justly entitled to have the sum of one hundred and sixty-eight $\frac{7}{10}$ dollars refunded, and they now ask and demand the same; and this deponent further makes oath that he has not heretofore presented any claim for the refunding of the above amount or any part thereof.

(Signed)

H. GORDON McCOUNCH.

Sworn and subscribed before me this 9th day of May, A. D. 1899.
(Signed)

W. C. HARRIS,

[NOTARIAL SEAL.]

Notary Public.

R. C. DALE,

Att'y, Room 752 Bullitt Bldg., Phila.

22

"EXHIBIT C."

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
WASHINGTON, D. C., August 24th, 1899.

The Fidelity Insurance, Trust and Safe Deposit Co., Philadelphia, Penna.

SIR: Your claim for the refunding of one hundred sixty-eight $\frac{7}{10}$ dollars has been rejected for the reason that the legacy tax was legally assessed and collected.

Respectfully yours,

ROBT WILLIAMS, JR.,

Acting Commissioner.

C. P. No. 2, June Term, 1899.

23 THE FIDELITY INS., TRUST & SAFE DEPOSIT CO.,
Executor under the Will of Daniel Craig, Dec'd, } No. 1212.
vs.
PENROSE A. MCCLAIN.

George Wilhelm, being sworn according to law, deposes and says that on the 29th day of August, 1899, he duly served upon Penrose A. McClain, internal-revenue office, above-named defendant, a copy of plaintiff's statement filed in above case, with a notice endorsed thereon that a rule had been entered on the defendant to file an affidavit of defence in fifteen (15) days or judgment *sec. reg.* by—

Given to him the said copy and making known to him the contents.

GEORGE A. WILHELM.

Sworn and subscribed before me this 1st day of September, A. D. 1899.

C. N. ROBERTS,

Notary Public.

Endorsed: 1212, June term, 1899, C. P. No. 2. Fidelity Ins., Trust & Safe Dep. Co., executor under the will of Daniel Craig, *vs.* Penrose A. McClain. Filed Sep. 1, 1899. C. B. Roberts, pro prothonotary. Affidavit of service of statement. Assumpsit. R. C. Dale.

24 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set:*

The President of the United States to the honorable the judges of the court of common pleas No. 2 for the county of Phila., State of Penna., Greeting:

Whereas lately, in your said court, a suit was commenced by summons against Penrose A. McClain, collector of internal revenue for the first collection district of Pennsylvania, by the Fidelity Insurance, Trust & Safe Deposit Co., executor under the will of Daniel Craig, deceased, to June term, 1899, No. 1212; which said suit, as it is said, is still pending before you in the said court of common pleas No. 2 undetermined; and whereas, on the application of the said Penrose A. McClain, collector, &c., to the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, on a suggestion, supported by proper evidence, that the said suit was brought on account of an act done by him under color of his office as collector of internal revenue for the first district of Pennsylvania, the said suit having been brought to recover certain moneys paid by the said plaintiff to the said Penrose A. McClain, collector, &c., as aforesaid, for internal-revenue taxes claimed to be due and owing from the said plaintiff to the United States of America, and praying that a writ of certiorari may be immediately issued by the clerk of the said circuit court of the United States directed to the said court of common pleas No. 2 to send to the said circuit court of the United States the record and proceedings in the said cause, according to the provision of the act of Congress in such case made and provided:

Wherefore you are hereby commanded to transmit, under your seal, the record and proceedings of the said suit, with all things thereunto relating, unto the said circuit court of the United States, to be holden at Philadelphia, for the eastern district of Pennsylvania, in the third circuit, on the first Monday of October, plainly and distinctly, in as full and ample manner as *it* now remains before you, together with this writ, so that the said circuit court of the United States may be able therein to proceed and do what shall appear of right ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, this [SEAL.] 13th day of September, A. D. 1899, and in the 124th year of the Independence of the United States.

HENRY B. ROBB,
Deputy Clerk of Circuit Court U. S.

25 [Endorsed:] C. P. No. 2, No. 1212, June, 1899. No. 2, October sess., 1899, circuit court U. S. Fidelity Ins., Trust & Safe Deposit Co., executor, &c., vs. Penrose A. McClain, collector. Writ of certiorari. Sept. 13, 1899, bro't into office. C. B. R. Filed Sept. 14, 1899. Samuel Bell, clerk, per H. R.

To the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia:

The record and process and all things touching the same, so full and entire as before us they remain, we certify and send as within we are commanded.

SAM'L W. PENNYPACKER. [SEAL.]

26 And afterwards, to wit, on the 15th day of September, 1899, the said defendant, by James M. Beck, Esq., his attorney, comes into court here and files his plea; which said plea is as follows, to wit:

United States Circuit Court, Eastern District of Pennsylvania,
October Sessions, 1899.

FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, Executor under the Will of Daniel Craig, Deceased,	} No. 2.
vs.	
PENROSE A. MCCLAIN, Collector of Internal Revenue for the First Collection District of Penna.	

The defendant pleads non-assumpsit.

JAMES M. BECK,
By K., *United States Attorney.*

Endorsed: 2, Oct. sess., 1899, U. S. cir. ct. Fidelity Ins., &c., Co. vs. Penrose A. McClain, collector, &c. Plea. Filed Sep. 15, 1899. Samuel Bell, clerk. H. R. James M. Beck, U. S. att'y.

27 U. S. Circuit Court, October Sessions, 1899.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT Company, etc.,	} No. 2.
vs.	
PENROSE A. MCCLAIN.	

And now, to wit, this 11th day of November, A. D. 1899, the court, on motion of James M. Beck, Esq., attorney for the defendant, allows the defendant to withdraw his plea heretofore filed in this case and to file in place thereof a demurrer to the plaintiff's statement.

GEO. M. DALLAS, J.

Endorsed: U. S. C. C., E. D. of Pa., No. 2, Oct. sess., 1899. Fidelity Ins. Co. vs. Penrose A. McClain. Order allowing plea to be withdrawn and demurrer filed. Filed Nov. 11, 1899. Samuel Bell, clerk.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT
Company, etc.,

vs.

PENROSE A. McCLAIN.

No. 2.

And now, to wit, this 11th day of November, A. D. 1899, the said defendant, by James M. Beck, Esq., his attorney, comes and says that the statement is not sufficient in law to maintain the plaintiff's action, and the defendant therefore demurs thereto and in support of his said demurrer assigns the following reasons:

1. Because the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898, under which the tax sued for in this case was assessed, is not unconstitutional, as alleged in plaintiff's statement, in so far as the provisions of the said act relate to the tax on legacies and distributive shares of personal property.

2. Because the sections of the said act relating to the tax on legacies and distributive shares of personal property are not unconstitutional, as alleged in the said statement, but are in harmony with the following provisions of the Constitution of the United States, to wit:

29 Article 1, section 8, of the Constitution of the United States, which reads as follows:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

And—

Article 1, section 2, paragraph 3, of the Constitution of the United States, which reads as follows:

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

JAMES M. BECK,

U. S. Attorney, Attorney for Defendant.

Endorsed: U. S. cir. ct., E. D. of Pa. Fidelity Ins. Co. *vs.* Penrose A. McClain. Demurrer to statement. Filed Nov. 11, 1899. Samuel Bell, clerk.

30 And afterwards, to wit, on the 13th day of November, A. D. 1899, come the parties aforesaid by their counsel aforesaid, and this cause being called for argument *sur demurrer* to plaintiff's statement, and the court, being fully advised, renders the following opinion sustaining demurrer and directing judgment to be entered for the defendant; whereupon judgment is entered accordingly.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COM- pany, Executor under the Will of Daniel Craig,	} No. 2.
vs.	
PENROSE A. MCCLAIN.	

By the court, Dallas and McPherson, JJ. :

The demurrer filed to the plaintiff's statement of demand raises the question whether the succession tax or duty imposed by sections 29, 30, and 31 of the act of Congress approved June 13, 1898, is in conflict with the provisions of the Federal Constitution. Two clauses of the Constitution are invoked.

(a.) Article 1, section 8, which provides as follows :

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States ; but all duties, imposts and excises shall be uniform throughout the United States."

(b.) Article 1, section 2, par. 3, which provides as follows :

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

This question has already been considered by the circuit court of the United States for the northern district of Illinois in the case of High vs. Coyne, 93 Fed. Rep., 450, and the contention of the plaintiff that the statute is in conflict with the Federal Constitution was not sustained.

The court is informed that the case is now pending on appeal in the Supreme Court of the United States.

In view of the great importance of the question and the necessity of its ultimate determination by the court of last resort, we
32 feel that it is proper for this court to follow the decision of the circuit court in Illinois without any independent examination of the questions presented.

We therefore sustain the demurrer to the plaintiff's statement and direct that judgment in this cause be entered for the defendant.

Endorsed : 2, Oct. session, 1899, U. S. C. C. Fidelity Insurance, Trust, &c., Co. vs. Penrose A. McClain, collector, &c. Opinion sustaining demurrer, &c. Filed Nov. 13, 1899. Samuel Bell, clerk.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT Company, Executor under the Will of Daniel Craig, Deceased,	}	No. 2.
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vs.

PENROSE A. McCLAIN.

Petition for Writ of Error.

The petition of the Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, respectfully shows:

First. That the above-entitled action is brought by it against P. A. McClain, collector of United States internal revenue for the first district, in the State of Pennsylvania, to recover the sum of one hundred and sixty-eight $\frac{75}{100}$ dollars, with interest from the 9th day of May, 1899, a sum of money exacted by him of the plaintiff in performance of his official duty as collector, as aforesaid, and which sum has been paid by the said defendant into the Treasury of the United States, which sum, however, the plaintiff doth aver was unlawfully exacted and collected by the said defendant under the provisions of an act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13th, 1898, the said act being in derogation of rights secured to the citizens of the United States.

(a.) Article 1, section 8, of the Constitution of the United States, which reads as follows:

34 "The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

(b.) Article 1, section 2, paragraph 3, of the Constitution of the United States, which reads as follows:

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

Second. Your petitioner doth further show, notwithstanding the premises, the circuit court of the United States for the eastern district of Pennsylvania did, upon the 13th day of November, 1899, sustain a demurrer filed by defendant to the plaintiff's statement of its demand, in which statement of demand the constitutional rights, as aforesaid, were asserted, and did enter a final judgment in favor of the defendant and against the plaintiff.

Wherefore your petitioner prays that a writ of error be allowed to the judgment of said circuit court.

THE FIDELITY INSURANCE, TRUST &
SAFE DEPOSIT COMPANY,

[SEAL.]

*Executors of the Will of Daniel Craig.*JOHN B. GEST, *President.*Attest: H. GORDON MCCOUCH, *Secretary.*

35 STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss :

H. Gordon McCouch, being duly sworn according to law, doth depose and say that he is the secretary of The Fidelity Insurance, Trust and Safe Deposit Company, plaintiff in the above-entitled case, and that the statements contained in the foregoing petition are just and true as he verily believes.

(Signed)

H. GORDON MCCOUCH.

Sworn and subscribed to before me this 13th day of November, 1899.

WASHINGTON HERSH,
Notary Public.

[SEAL.]

36 [Endorsed :] 2, U. S. C. C., October sessions, 1899. The Fidelity Ins., T. & S. D. Co., executor, etc., vs. Penrose A. McClain. Petition for writ of error allowed. Geo. M. Dallas, cir. J. Filed Nov. 13, 1899. Samuel Bell, clerk. R. C. Dale.

37 U. S. C. C., October Sessions, 1899.

THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COM-
pany, Executor under the Will of Daniel Craig, Deceased, }
vs. } No. 2.
PENROSE A. MCCLAIN.

Assignments of Error.

First. That the court erred in sustaining the demurrer to the plaintiff's statement of claim, because by the statement of plaintiff's demand it appeared that the tax assessed against the plaintiff and exacted by the defendant was illegal, because the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," was in derogation of the provisions of article 1, section 8, of the Constitution of the United States, which reads as follows :

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts, and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Second. That the court erred in sustaining the demurrer to the plaintiff's statement of claim, because by the statement of plaintiff's demand it appeared that the tax assessed against the plaintiff and exacted by the defendant was illegal, because the act of Congress approved June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," was in derogation of the provisions of article 1, section 2, paragraph 3, of the Constitution of the United States, which reads as follows .

38 "Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

R. C. DALE,
For Plaintiff.

39 [Endorsed:] 2, U. S. C. C., October sessions, 1899. The Fidelity Ins., T. & S. D. Co., executor, etc., *vs.* Penrose A. McClain. Assignments of error. Filed Nov. 13, 1899. Samuel Bell, clerk. R. C. Dale.

40 Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit.

Know all men by these presents that The Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, deceased, and The American Surety Company are held and firmly bound unto Penrose A. McClain in the sum of two hundred and fifty dollars, to be paid to the said Penrose A. McClain; for the payment of which, well and truly to be made, we bind ourselves and each of us and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 13th day of November, in the year one thousand eight hundred and ninety-nine (1899).

Whereas the above-named Fidelity Insurance, Trust & Safe Deposit Company, executor under the will of Daniel Craig, deceased, has sued out a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States of the eastern district of Pennsylvania:

Now, therefore, the condition of this obligation is such that if the above-named Fidelity Insurance, Trust & Safe Deposit Company, executor as aforesaid, shall prosecute said writ of error to effect and answer all damages and costs if it fail therein, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE FIDELITY INSURANCE, TRUST &
SAFE DEPOSIT COMPANY.

JOHN B. GEST, *President.*

Attest: H. GORDON MCCOUCH, *Secretary.* [SEAL.]

AMERICAN SURETY CO. OF NEW YORK,
By JNO. C. S. DAVIS, *Resident Vice-President.*

Attest: F. H. WILLIAMS,
Resident Ass't Secretary. [SEAL.]

Nov. 13, 1899.

Approved:
GEO. M. DALLAS, *Cir. Judge.*

41 [Endorsed:] C. C. U. S., E. D. of Pa., 2, Oct. sess., 1899. Fidelity Ins. Co. *vs.* McClain. Bond surwrit of error. Filed Nov. 13, 1899. Samuel Bell, clerk.

42 UNITED STATES OF AMERICA, }
Eastern District of Pennsylvania, } *set :*

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true, complete, and faithful copy of the original pleas and proceedings in the case of The Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, deceased, *vs.* Penrose A. McClain, No. 2, October sess., 1899, on file and now remaining among the records of the said court in my office.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court, at
 Seal U. S. Circuit Court, Philadelphia, this 14th day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

SAMUEL BELL,
Clerk of C. C.

[Endorsed :] No. 2, Oct. sessions, 1899, circuit court United States, eastern district of Pennsylvania. Fidelity Ins., Trust & Safe Dep. Co., executor, *vs.* McClain. Certified copy of record.

Endorsed on cover: File No., 17,565. E. Pennsylvania C. C. U. S. Term No., 451. The Fidelity Insurance, Trust & Safe Deposit Company, executor under the will of Daniel Craig, deceased, plaintiff in error, *vs.* Penrose A. McClain. Filed November 17th, 1899.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 459.

GEORGE T. MURDOCK, AS EXECUTOR OF JANE H. SHER-
MAN, DECEASED, PLAINTIFF IN ERROR,

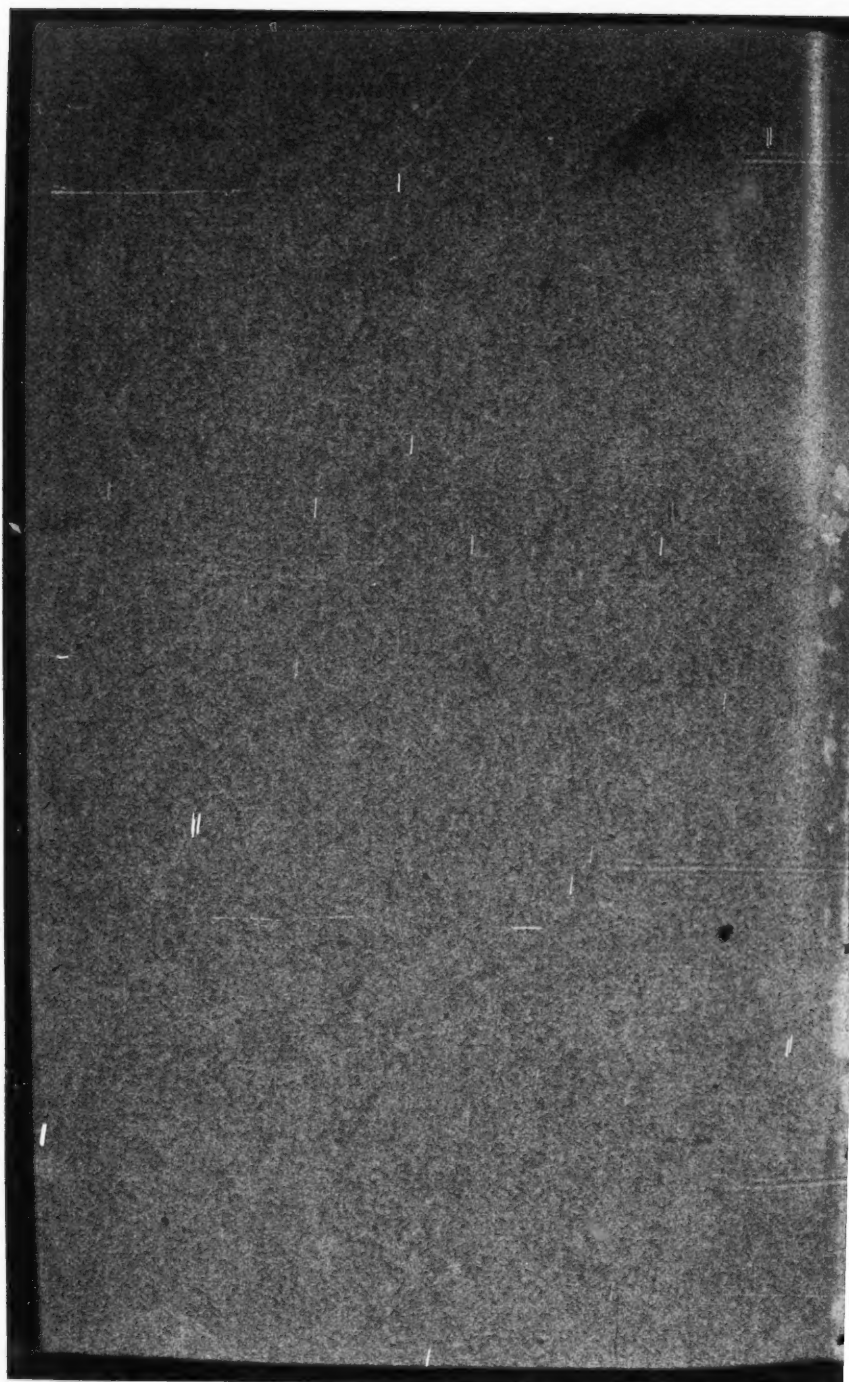
vs.

JOHN G. WARD, AS U. S. COLLECTOR OF INTERNAL
REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 23, 1899.

(17,572.)



(17,572.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 458.

GEORGE T. MURDOCK, AS EXECUTOR OF JANE H. SHER-
MAN, DECEASED, PLAINTIFF IN ERROR,

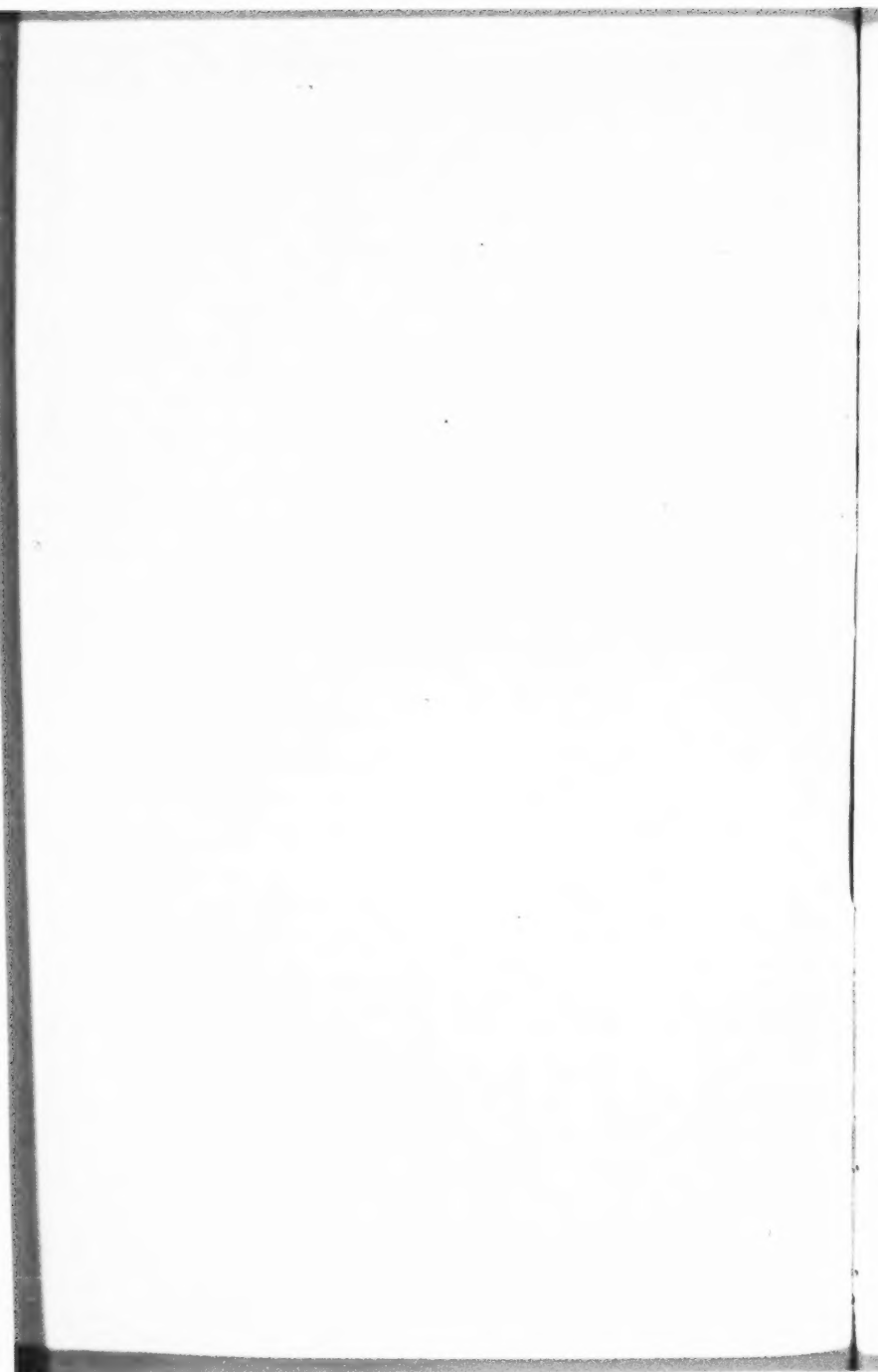
vs.

JOHN G. WARD, AS U. S. COLLECTOR OF INTERNAL
REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, ss :

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, plaintiff in error, against John G. Ward, as United States collector of internal revenue, fourteenth collection district, State of New York, defendant in error, a manifest error hath happened, to the great damage of the said George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 22nd day of November, 1899, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal of U. S. Circuit Court, South. Dist. New York.]

JNO. A. SHIELDS,

*Clerk of the Circuit Court of the United States of America
for the Southern District of New York, in the Second Circuit.*

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,

U. S. Circuit Judge.

2 [Endorsed:] E. & A. B. 1718. Supreme Court of the United States. George T. Murdock, as executor, &c., plaintiff in error, vs. John G. Ward, collector of internal revenue, 14th dist. of N. Y., defendant in error. Writ of error. Charles E. Patterson & Alpheus T. Bulkeley, attorneys for plaintiff in error, 25 North Pearl street, Albany, N. Y. Due service of a copy of the within writ of error is hereby admitted this — day of —, 189—. — —, attorney for defendant in error. A copy of the within paper has been

this day received at this office. Nov. 17, 1899. Henry L. Burnett, U.S. attorney. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk. 1.45 p'd.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss :

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the following pages, numbered from three (3) to 30, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, plaintiff in error, against John G. Ward, as United States collector of internal revenue, fourteenth collection district, State of New York, defendant in error, as the same remains of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this twenty-first day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States the one hundred and twenty-fourth.

[Seal of U. S. Circuit Court, South. Dist., New York.]

JOHN A. SHIELDS, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled Nov. 21, 1899. J. A. S.]

3 In the Circuit Court of the United States for the Southern District of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff,	}
<i>against</i>	
JOHN G. WARD, as United States Collector of Internal Revenue, Fourteenth Collection District, State of New York, Defendant.	}

And now comes George T. Murdock, executor of the last will and testament of Jane H. Sherman, deceased, and considering himself aggrieved by the judgment entered herein on the 16th day of November, 1899, does hereby pray that a writ of error be allowed from the said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the Supreme Court of the United States.

And he presents herewith his assignment of errors.

CHARLES E. PATTERSON AND
ALPHEUS T. BULKELEY,
*Attorneys for Plaintiff in Error, No. 25 North
Pearl Street, Albany, N. Y.*

And now, to wit, on November 17th, 1899, it is ordered that the writ of error be allowed as prayed for.

E. HENRY LACOMBE,
Circuit Judge.

4 (Endorsed:) U. S. circuit court, southern district of New York. George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, plaintiff, against John G. Ward, as United States collector of internal revenue, fourteenth collection district, State of New York, defendant. Petition for writ of error. Charles E. Patterson and Alpheus T. Bulkeley, att'ys for pl'ff in error, No. 25 North Pearl St., Albany, N. Y. A copy of the within paper has been this day received at this office. Nov. 17, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk.

5 Circuit Court of the United States, Southern District of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff,	} Petition.
<i>vs.</i>	
JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, Defendant.	

To the judges of the circuit court of the United States of America for the southern district of New York:

The petition of John G. Ward, the defendant above named, respectfully shows:

First. That the above-entitled action has been brought in the supreme court of the State of New York in and for the county of New York; that said action is now at issue, and that no trial has been had in said cause.

Second. That said action is brought by the said plaintiff against the above-named defendant to recover from said defendant the sum of \$36,827.53, being a tax collected by defendant from the plaintiff as an internal-revenue tax upon the estate of one Jane H. Sherman, deceased, under and in pursuance of an act of Congress of the United States commonly known as "the war-revenue law."

6 Third. That the matter in dispute in said action exceeds, exclusive of interest and costs, the sum of \$2,000, as appears from the summons and complaint in said action, copies of which are hereto annexed and marked Exhibits "A" and "B," respectively, and are made a part of this petition.

Fourth. That this suit is of a civil nature and has been commenced in a court of a State, to wit, the supreme court of the State of New York, against this defendant, who, on the 4th day of April, 1899, and at all the times mentioned and set forth in the complaint herein, was an officer appointed under or acting by authority of the revenue law of the United States, to wit, a collector of internal reve-

nue for the fourteenth district of the State of New York, duly commissioned as such by the President of the United States, and exercising the functions of such officer in accordance with such appointment, having his office and official place of residence at the city of Albany, in the State of New York. This action is brought on account of an alleged act done under color of his office or of said law or on account of a right, title, and authority claimed by this defendant as such officer under such law, and the same is removable to the United States circuit court for the southern district of New York under and by virtue of section 643 of the Revised Statutes of the United States.

Fifth. That this petitioner therefore prays that in pursuance of said section 643 of the Revised Statutes of the United States and of the acts of Congress in such case made and provided the said case so commenced as aforesaid in the said supreme court of the State of

7 New York, in the county of New York, may be removed therefrom as to this defendant and entered on the docket of this honorable court and thereafter proceeded in as a cause originally commenced in this court; and this petitioner will forever pray, &c.

JOHN G. WARD,
By HENRY L. BURNETT, *Petitioner.*

SOUTHERN DISTRICT OF NEW YORK, }
City and County of New York, } ss :

Henry L. Burnett, being duly sworn, says that he is the United States attorney for the southern district of New York; that he has read the foregoing petition and knows the contents thereof; that the same is true to the knowledge of the deponent except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the reason why this verification is not made by the petitioner in person is that he resides at Albany, New York, and is not at the present time within this jurisdiction; that the grounds of deponent's belief as to all matters stated in said petition not upon his own knowledge is derived from papers and correspondence in deponent's possession with reference to the subject-matter of this action, and also the summons and complaint in the action.

HENRY L. BURNETT.

8 Sworn to before me this 14th day of November, 1899.

[SEAL.] FREDERICK L. CAMPBELL,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

I certify that, as counsel for the petitioner, I have examined into all the matters set forth in the within petition and affidavit, and that I believe the same to be true.

Dated New York, Nov. 14th, 1899.

HENRY L. BURNETT,
United States Attorney, Counsellor of the said Circuit Court.

- 9 The President of the United States of America to the judges of the supreme court of the State of New York, Greeting :

We, for certain reasons, being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you against John G. Ward, collector of internal revenue for the fourteenth district of the State of New York, by George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court, at the city of New York, on the 15th day of November, 1899, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of November, in the year one thousand eight hundred and ninety-nine.

JOHN A. SHIELDS, *Clerk.*

HENRY L. BURNETT,

United States Attorney, Attorney for Defendant.

Allowed.

E. HENRY LACOMBE,

U. S. Circuit Judge.

- 10 (Endorsed :) U. S. circuit court. George T. Murdock, as executor, &c., *versus* John G. Ward, collector internal revenue, &c. Certiorari. Henry L. Burnett, United States attorney, attorney for defendant. I have this day personally served upon the clerk of the supreme court of the State of New York a duplicate of the within writ, at the same time showing the original. Wm. Henkel, U. S. marshal. Dated Nov. 14, 1899. U. S. circuit court. Filed Nov. 14, 1899. John A. Shields, clerk.

- 11 STATE OF NEW YORK :

Supreme Court, County of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff,

JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, Defendant.

To the above-named defendant :

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and, in case of your failure to appear or answer

judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the county of New York.

Dated this 24th day of October, 1899.

PATTERSON, BULKELEY & VAN KIRK,
Plaintiff's Attorneys.

Office and P. O. address, 25 North Pearl street, Albany, N. Y.

12 In the Supreme Court of the State of New York, County of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff,	}
<i>against</i>	
JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, Defendant.	}

The above-named plaintiff, by Patterson, Bulkeley & Van Kirk, his attorneys, for complaint in the above-entitled action, alleges and states upon information and belief that—

I. Jane H. Sherman, late of the village of Port Henry, in the county of Essex and State of New York, died on or about the 30th day of September, 1898, leaving certain property, and also leaving a last will and testament, in and by which said will this plaintiff, George T. Murdock, was appointed to be, and by due order of the surrogate of the county of Essex, in the State of New York, to whom jurisdiction in that behalf pertained, he has become and is, the sole executor of the said last will and testament of said Jane H. Sherman.

II. The plaintiff further alleges and states that the said Jane H. Sherman, deceased, upon her death left a very considerable amount of personal property, amounting to upwards of one million of dollars.

13 III. That the defendant, John G. Ward, at all the times mentioned in this complaint was and he is collector of internal revenue for the fourteenth district of the State of New York, having his office and official place of residence at the city of Albany, in the State of New York.

IV. That said John G. Ward, assuming to act as such collector, and assuming and pretending to act under and by virtue of the laws of the United States, which he assumed conferred authority upon him therefor, and particularly under and in pursuance of the provisions of an act of the Congress of the United States, commonly known as the "war-revenue law" of June 13, 1898, and being an act to provide ways and means to meet war expenditures, and for other purposes, passed by the Congress of the United States, and becoming a law on the 13th day of June, 1898, did, on or about the fourth day of April, 1899, by force and duress, exact, demand, and collect from this plaintiff and from the estate represented by him as such executor the sum of thirty-six thousand eight hundred and twenty-seven

dollars and fifty-three cents (\$36,827.53), and upon the claim and under the pretext that the same was a lawful assessment as an internal-revenue tax upon the estate of said deceased and against this plaintiff, as executor of said deceased, on account of the legacies or distributive shares arising from personal property being in charge or trust of this plaintiff, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman.

14 V. That on or about the 8th day of April, 1899, this plaintiff, under protest, and protesting that he was not nor was the estate represented by him liable to pay said tax involuntarily and under duress because of the illegal demand made upon him by said defendant, did pay to the said defendant as such collector, as aforesaid, the said sum of \$36,827.53.

VI. That thereafter, believing the imposition of said tax and its collection to be unlawful, this plaintiff did appeal to the Commission of Internal Revenue and to the Treasury Department of the United States of America from the action and decision of said defendant in holding this plaintiff to be liable for the payment of said tax and in collecting the said tax in manner aforesaid, and did state and represent to said Commissioner that the collection of said tax was unlawful, and that the amount thereof should be refunded for the following reasons:

"First. The imposition of said tax was unconstitutional, unlawful, and void.

"Second. The imposition and collection of said tax deprived this deponent of his property and the estate represented by him of its property without due process of law.

"Third. That the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

"Fourth. That the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

15 "Fifth. That the law under which said tax was imposed denies to this deponent the equal protection of the laws.

"Sixth. The tax so imposed is a direct tax, and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

"Seventh. If said tax is an impost, excise, or duty, the law imposing the same is unconstitutional and void because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States; and

"Eighth. It is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the State of New York."

And this plaintiff did, in and by such appeal, claim that he was entitled to have the sum of money so paid and the amount thereof refunded, and he did then and there ask and demand the return of

the same moneys to him, and did appeal from the act of the said defendant as such collector in imposing said tax and exacting from the plaintiff payment of the amount thereof.

VII. On the 21st day of October, 1899, the said Commissioner of Internal Revenue and the Treasury Department of the United States, represented by the said Commissioner of Internal Revenue, did disallow the appeal of this plaintiff in the behalf above stated and did reject the claim of the plaintiff to have refunded the amount of the tax paid as aforesaid.

16 VIII. A very large proportion and at least one-third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the Government of the United States and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding, as executor, as aforesaid, or otherwise of such bonds and certificates of indebtedness.

IX. This plaintiff claims and charges that by reason of the premises the amount of said tax has been unlawfully exacted from him as executor of said estate; that each and every of the grounds stated by him in the above-mentioned appeal to the said Commissioner of Internal Revenue states and represents a true and lawful reason why the imposition of said tax is unlawful and why the said tax should be refunded.

Wherefore this plaintiff demands judgment against the said defendant for the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents (\$36,827.53), with interest from the 8th day of April, 1899, with the costs of this action.

PATTERSON, BULKELEY & VAN KIRK,

Attorneys for Plaintiff, 25 North Pearl Street, Albany, N. Y.

17 STATE OF NEW YORK, }
County of Albany, } ss:

Charles C. Van Kirk, being duly sworn, deposes and says that he is one of the attorneys for the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the grounds of his belief as to all matters stated in said complaint not upon his own knowledge are statements made to him by the plaintiff, his knowledge of transactions in court, and records and correspondence with reference to the subject-matter of the action; that the reason why this verification is not made by the plaintiff is that he resides in the county of Essex and is not now in the county in which his attorneys reside.

C. C. VAN KIRK,

Sworn to before me this 24th day of October, 1899.

FOSTER PRUYN,
Notary Public, Albany Co., N. Y.

18 (Endorsed :) Supreme court, State of N. Y. County of New York. George T. Murdock, as ex'r, &c., vs. John G. Ward, collector of internal revenue, &c. Summons and complaint. Patterson, Bulkeley & Van Kirk, attorneys for plaintiff, 25 North Pearl St., Albany, N. Y.

(Further endorsed :) U. S. circuit court, southern district of New York. George T. Murdock, as executor, &c., *versus* John G. Ward, internal-revenue col., &c. Petition for removal. Henry L. Burnett, United States attorney. U. S. circuit court. Filed Nov. 14, 1899. John A. Shields, clerk.

19 United States Circuit Court, Southern District of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff,	}
<i>against</i>	
JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, Defendant.	}

The defendant above named, appearing by Henry L. Burnett, Esq., United States attorney for the southern district of New York, his attorney, hereby demurs to the complaint herein upon the ground that it appears on the face of said complaint that the same does not state facts sufficient to constitute a cause of action.

Dated New York city, N. Y., November 14th, 1899.

HENRY L. BURNETT,
*United States Attorney for the Southern District
of New York, Attorney for the Defendant,
Room 50, Post-office Building, New York City, N. Y.*

(Endorsed :) U. S. circuit court, southern district of New York. George T. Murdock, as executor of the last will, etc., of Jane H. Sherman, deceased, *versus* John G. Ward, collector of internal revenue for the 14th district of the State of N. Y. Demurrer. Henry L. Burnett, United States attorney, attorney for defendant. Due service of a copy of the within is hereby admitted. Dated New York, Nov'r 14th, 1899. Patterson, Bulkeley & Van Kirk, attorneys for plaintiff. Demurrer sustained Nov. 14, 1899. E. H. L., U. S. C. J. U. S. circuit court. Filed Nov. 14, 1899. John A. Shields, clerk.

20 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second judicial circuit, held at the Federal court-house, in the city of New York, on the 14th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: Hon. E. Henry Lacombe, circuit judge.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament
of Jane H. Sherman, Deceased, Plaintiff,

vs.

JOHN G. WARD, Collector of Internal Revenue for the Fourteenth
District of the State of New York, Defendant.

This cause coming regularly on for trial upon the demurrer filed November 14th, 1899, to the complaint filed on the 14th day of November, 1899, and after hearing Henry L. Burnett, Esq., United States attorney for the southern district of New York, and counsel for the defendant, in support of said demurrer, and Charles E. Patterson, of Patterson, Bulkeley & Van Kirk, of counsel for the plaintiff, in opposition thereto, and after due deliberation having been had thereon, it is—

Ordered that the demurrer interposed by the defendant to the complaint in this action, as aforesaid, be, and the same is hereby, sustained; and it is further—

Ordered that the said complaint be, and the same is hereby,
21 dismissed, with costs to the defendant to be adjusted in the
general manner, and the clerk is hereby directed to enter
judgment herein in accordance herewith.

E. HENRY LACOMBE,

Circuit Judge.

(Endorsed:) U. S. circuit court, southern dist. of New York.
George T. Murdock, as executor of the last will, etc., of Jane H. Sherman, deceased, *versus* John G. Ward, collector of internal revenue for the 14th district of the State of New York. Order sustaining demurrer. Henry L. Burnett, United States attorney, attorney for defendant. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk.

22 United States Circuit Court, Southern District of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testament
of Jane H. Sherman, Deceased, Plaintiff,

against

JOHN G. WARD, Collector of Internal Revenue for the Fourteenth
District of the State of New York, Defendant.

The issues in the above-entitled cause having been joined by the defendant filing a demurrer to the complaint on the 14th day of November, 1899, and an order having been entered by the Honorable E. Henry Lacombe, circuit judge, holding the court, on the 14th day of November, 1899, directing that the said demurrer be sustained and dismissing the complaint, with costs to the defendant, to be taxed, and directing entry of judgment for said costs, and the costs having been taxed by the clerk at the sum of ten dollars:

Now, on motion of Henry L. Burnett, Esq., United States attorney, appearing for defendant, it is—

Adjudged that the said demurrer filed in this action by the said

defendant to the complaint of plaintiff herein be, and is hereby, sustained, and that the said complaint of the plaintiff be, and is hereby, dismissed; and it is further—

Adjudged that the above-named defendant recover of the above-named plaintiff the sum of ten dollars, his costs as taxed, and that judgment be docketed in favor of said defendant and against the said plaintiff therefor, and that execution be issued against the said plaintiff on said judgment.

E. H. LACOMBE,
U. S. Circuit Judge.

Dated New York city, N. Y., Nov'r 14th, 1899.

BY THE COURT.

(Endorsed :) U. S. circuit court, southern district of New York. George T. Murdock, as executor of the last will, etc., of Jane H. Sherman, deceased, *versus* John G. Ward, collector of internal revenue for the 14th district of the State of New York. Judgment on demurrer. Henry L. Burnett, United States attorney, attorney for defendant. U. S. circuit court. Filed Nov. 16, 1899. John A. Shields, clerk.

21 Supreme Court of the United States, October Term, 1899.

<p>GEORGE T. MURDOCK, as Executor of the Last Will and Testament of Jane H. Sherman, Deceased, Plaintiff in Error, <i>against</i> JOHN G. WARD, Collector of Internal Revenue for the Fourteenth District of the State of New York, Defendant in Error.</p>	}	Assignment of Errors.
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Now comes George T. Murdock, executor of the last will and testament of Jane H. Sherman, deceased, by his counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the circuit court of the United States for the southern district of New York, in the second judicial circuit, in the above-entitled cause, and assigns error thereto, as follows:

I. The court erred in sustaining the demurrer and dismissing the appeal of plaintiff herein.

II. The court erred in refusing to find, as was claimed by the plaintiff in error, that the imposition of the tax described in the complaint against the plaintiff in error because of his ownership as executor of the last will and testament of Jane H. Sherman, deceased, of the property mentioned in the complaint, was unconstitutional, unlawful, and void.

III. The said court erred in not deciding that the imposition and collection of said tax deprived this deponent of his property and the estate represented by him of its property without due process of law.

IV. Such circuit court erred in refusing to find that the law imposing said tax is not uniform and does not afford equal protection of the laws to persons throughout the United States.

25 V. The said circuit court erred in refusing to find that the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

VI. The court erred in refusing to find that the law under which said tax was imposed denies to the plaintiff in error the equal protection of the laws.

VII. The court erred in refusing to find that the tax so imposed is a direct tax and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

VIII. The said court erred in refusing to find that if said tax is an impost, excise, or duty, the law imposing the same is unconstitutional and void because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States.

IX. The court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York.

X. The court erred in refusing to find that in so far as the estate of the deceased consisted of the Government bonds of the United States mentioned in said complaint the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint and which was assessed against the plaintiff in error because of his ownership as executor as aforesaid of such bonds of the Government of the United States.

26 XI. The court erred in not overruling the demurrer to the said complaint.

Wherefore the said plaintiff in error prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the circuit court of the United States for the southern district of New York entered in the above-entitled cause.

CHARLES E. PATTERSON AND
ALPHEUS T. BULKELEY,

Attorneys for Plaintiff in Error.

(Endorsed:) United States circuit court, southern district of New York. George T. Murdock, as executor, &c., pl'ff in error, against John G. Ward, collector of internal revenue, 14th dist. of N. Y. Assignment of errors. Charles E. Patterson & Alpheus T. Bulkeley, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. A copy of the within paper has been this day received at this office. Nov. 17, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk.

27 United States Circuit Court, Southern District of New York.

GEORGE T. MURDOCK, as Executor of the Last Will and Testa- ment of Jane H. Sherman, deceased,	}
JOHN G. WARD, Collector of Internal Revenue for the 14th Dis- trict of the State of New York.	

Know all men by these presents that we, George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, as principal, and the United States Fidelity & Guaranty Company, Baltimore, Maryland, having a place of business in the city of New York, as surety, are held and firmly bound unto John G. Ward, collector of internal revenue for the 14th district of the State of New York, in the full and just sum of five hundred dollars, to be paid to the said obligee, his certain attorney, successors, or assigns; to which payment, well and truly to be made, I bind myself, my successors and assigns, and the said company binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated this 15th day of November, in the year of our Lord eighteen hundred and ninety-nine.

Whereas the above-named George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, has prosecuted a writ of error to the Supreme Court of the United States to reverse a decree rendered in the above-entitled action by the judge of the circuit court of the United States for the southern district of

New York :

28 Now, therefore, the condition of the above obligation is such that if the said George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then this obligation shall be void ; otherwise to remain in full force and virtue.

GEO. T. MURDOCK,

*As Executor of the Last Will & Testament
of Jane H. Sherman, Deceased.*

UNITED STATES FIDELITY &
GUARANTY COMPANY OF
BALTIMORE, MARYLAND,

By ALPHEUS T. BULKELEY,
JOHN V. McHARG,

Attorneys-in-fact.

Sealed and delivered and taken and acknowledged this 15th day of November, 1899.

H. B. WILLARD,

Notary Public for Essex County.

Approved as a supersedeas bond.

STATE OF NEW YORK,
Northern District of New York, County of Essex, } ^{ss}:

On this fifteenth day of November, 1899, before me, the subscriber, personally appeared George T. Murdock, to me known and known to me to be the individual described and who executed the foregoing instrument, and who acknowledged the execution thereof.

H. B. WILLARD,
Notary Public for Essex County.

29 CITY OF ALBANY,
County of Albany, State of New York, } ^{ss}:

On this 16th day of November, 1899, before me personally appeared Alpheus T. Bulkeley & John V. McHarg, attorneys-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who, being by me severally duly sworn, said that they resided in the city of Albany, N. Y.; that they are the attorneys-in-fact of the United States Fidelity and Guaranty Company; that they knew the corporate seal of said company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed said instrument as attorneys-in-fact of said company by like authority; and the said Edwin G. Day further said that he is acquainted with Alpheus T. Bulkeley & John V. McHarg and knew them to be the attorneys-in-fact of said company, and that the signature of the said Alpheus T. Bulkeley & John V. McHarg subscribed to the said instrument is the genuine handwriting of the said Alpheus T. Bulkeley & John V. McHarg, and was thereto subscribed by the like order of the said board of directors and in the presence him, the said Edwin G. Day.

EDWIN G. DAY,
Notary Public, Albany Co., N. Y.

At a special meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company in the city of Baltimore, State of Maryland, on the 29th day of January, A. D. 1898, at which was present a quorum of said directors duly authorized to act in the premises, on motion it was unanimously—

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, Alpheus T. Bulkeley & John V. McHarg, the attorneys-in-fact of the United States Fidelity and Guaranty Company for the counties of Albany and Schoharie, Delaware & Otsego, in the State of New York, be, and each of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for and on behalf of this company, and to attach thereto the seal of the company, the same to be

attested by either one of the said attorneys-in-fact above named as occasion may require.

CITY OF ALBANY,
County of Albany, State of New York, } ss :

We, Alpheus T. Bulkeley & John V. McHarg, attorneys-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under our hands and the seal of the company, at Albany, this 16th day of November, 1899.

ALPHEUS T. BULKELEY,
JOHN V. MCHARG,

Attorneys-in-fact.

30 (Endorsed :) United States circuit court, southern district of New York. Geo. T. Murdock, as ex'r of the last will and testament of Jane H. Sherman, deceased, vs. John G. Ward, collector of internal revenue for the 14th district of New York. Undertaking on writ of error. Charles E. Patterson, Alpheus T. Bulkeley, att'ys for pl'ff in error. A copy of the within paper has been this day received at this office. Nov. 17, 1899. Henry L. Burnett, U. S. attorney. Approved as to form, and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the proper officers of the surety company, under oath, touching its assets, liabilities, and financial condition generally. E. Henry Lacombe, U. S. circuit judge. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk.

31 UNITED STATES OF AMERICA, ss :

To John G. Ward, United States collector of internal revenue, fourteenth district of the State of New York, Greeting :

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Given under my hand, in the city of New York, in the district above named, on the 17 day of November, 1899, and of the Independence of the United States the one hundred and twenty-fourth.

Seal of U. S. Circuit
Court, South. Dist.
New York.

E. HENRY LACOMBE,

— *United States Circuit Court, Second Circuit.*

32 [Endorsed:] E. & A. B. 1718. United States circuit court,
northern district of New York. George T. Murdock, as executor, &c., pl'ff in error, against John G. Ward, collector of internal revenue, 14th dist. of N. Y., def't in error. Original. Citation. Charles E. Patterson & Alpheus T. Bulkeley, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due and personal service of cop- of the within — admitted this — day of —, 189—. — —, attorney for —. A copy of the within paper has been this day received at this office. Nov. 17, 1899. Henry L. Burnett, U. S. attorney. U. S. circuit court. Filed Nov. 17, 1899. John A. Shields, clerk. 10 pd.

Endorsed on cover: File No., 17,572. S. New York C. C. U. S. Term No., 458. George T. Murdock, as executor of Jane H. Sherman, deceased, plaintiff in error, *vs.* John G. Ward, as U. S. collector of internal revenue. Filed November 23d, 1899.

IN SENATE,

COMMITTEE ON THE UNITED STATES

REPORT ON THE PROCEEDINGS

IN 1899.

GEORGE D. SHERMAN, PLAINTIFF IN ERROR,

VS.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 26, 1899.

(17,573.)

(17,573.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 459.

GEORGE D. SHERMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR
THE NORTHERN DISTRICT OF NEW YORK,

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1 UNITED STATES OF AMERICA, ss :

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of New York, Greeting :

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said circuit —, before you, between George D. Sherman, plaintiff in error, and The United States, defendant in error, a manifest error hath happened, to the great damage of the said George D. Sherman, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 20th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,

*Clerk of the United States Circuit Court, Second
Circuit, Northern District of New York.*

Allowed by—

WM. J. WALLACE,

United States Circuit Judge.

2 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman, pl'ff in error, against The United States, deft in error. Original writ of error. Charles E. Patterson and Alpheus T. Bulkeley, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due and personal service of — cop- of the within — admitted this — day of —, 189—. —, attorney for —. U. S. circuit court, N. D. of N. Y. Filed Nov. 20, 1899. W. S. Doolittle, clerk.

3 To the circuit court of the United States for the northern district of New York :

George D. Sherman presents this his petition to this honorable court and states that he resides at Port Henry, in the county of Essex, in the said northern district of New York ; and he further states as follows :

I. This petitioner is a son, heir-at-law, and next of kin of Jane H. Sherman, deceased.

II. That said Jane H. Sherman died on or about the 30th day of September, 1898, being at the time of her death a citizen of the United States and a resident of the village of Port Henry, in the county of Essex and State of New York.

III. That at the time of her death said Jane H. Sherman left a last will and testament, of which a copy is hereto annexed, marked "A."

IV. At the time of her death the said Jane H. Sherman was possessed of a considerable personal estate and of the value of one million two hundred and thirty-three thousand five hundred and seventy-one dollars (\$1,233,571), a considerable portion of which, to wit, at least one-third thereof, consisted of what are commonly called Government bonds—that is to say, bonds issued by the Government of the United States under the authority of acts of Congress—and certificates of indebtedness of the Government of the United States issued under the provisions of act of Congress, bearing interest, and which bonds or certificates of indebtedness this petitioner is advised and believes, and charges the fact to be, are not sub-

4 ject to assessment or taxation by the United States or by any State, and there is, by virtue of the acts of Congress directing the issuing of such bonds and certificates of indebtedness, a contract between the Government of the United States and the holders of such bonds and certificates of indebtedness that the same are non-taxable and non-assessable for the purposes of taxation.

V. By virtue of the nomination in said will of George T. Murdock to be the executor thereof, the said Murdock has become and by virtue of the appointment of the surrogate of the county of Essex, to whom jurisdiction in that behalf pertained, he is sole executor of said will, and trustee of the estate passing from said Jane H. Sherman.

VI. Upon his information and belief your petitioner further alleges that after the said Murdock had become executor of said will and trustee of the estate of said Jane H. Sherman, under and by virtue of the provisions of said will, John G. Ward, collector of internal revenue for the fourteenth district of New York, exacted and demanded from the said Murdock the payment of a duty or tax claimed to be imposed upon said Murdock, as such executor, as aforesaid, under and by virtue of section 29 of an act of the Congress of the United States entitled "An act to provide ways and means to meet war expenditures, and for other purposes," passed the 13th day of June, 1898, and the said Murdock, as such executor, as aforesaid, by reason of such demand and under duress and threat of the penalties enumerated in the said act, acceded to such demand and exaction of the said collector, and did pay to the said collector, on account of the assessment made against him as such executor, in accordance with the terms and provisions of said act of Congress, the sum of \$36,827.53,

5 of which the sum of \$8,969.02 was, because of the provisions of said act and under pretence of the authority thereof and because of the demands of the Commissioner of Internal Revenue

and rulings made by him in like cases, taken and deducted by said executor from the income due and payable to your petitioner, under and by virtue of the provisions of said will, from the shares of said estate, including Government bonds set apart by virtue of the provisions of said will as the share of said estate from which the income is payable to your petitioner during his life; and if the said payment was lawfully required to be made by said executor, he, the said executor, was authorized by said act to pay the same from the funds of said estate, and, in fact, he did pay the same from the income of said estate payable to your petitioner, and deducted the same therefrom.

VII. Your petitioner upon his information and belief alleges and states that the sum of money so collected by said collector and by such executor paid, to wit, the said sum of \$36,827.53, was by said collector duly paid over to the Treasury of the United States, and has been accepted and received and is held by the United States; that said executor was by said collector of internal revenue required to make and he did make a sworn return of the value of said estate upon a blank furnished by the said collector, and of which a copy is hereto annexed, marked "B."

VIII. Your petitioner further states and upon his information and belief alleges that the exaction of the payment of said sum of money, or duty, or tax by said collector from the said executor and the payment of the same by said executor to said collector for the United States were and are unlawful and have conferred and do confer upon the United States no title to the same, but the United States has unlawfully taken and withheld and does now withhold from your petitioner the said sum of \$8,969.02 under the circumstances and in manner aforesaid, and which sum is part of the moneys which your petitioner was and is entitled to receive and have free from tax or duty under and by virtue of the will of said Jane H. Sherman.

IX. Your petitioner is advised, and upon his information and belief he charges the fact to be, that the imposition of said tax was unconstitutional, unlawful, and void for the following reasons:

First. The imposition and collection of said tax deprived your petitioner of his property and the estate in which he is interested of its property without due process of law.

Second. That the law imposing said tax is not uniform and does not afford equal protection of the laws to persons throughout the United States.

Third. That the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

Fourth. That the law under which said tax was imposed denies to your petitioner the equal protection of the laws.

Fifth. The tax so imposed is a direct tax and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

Sixth. If said tax is an impost, excise, or duty, the law imposing

the same is unconstitutional and void because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States.

Seventh. It is not within the province of the constitutional powers of the United States or of the Congress to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York, or to create classes which may be lawfully regarded in the imposition of taxes, or to make distinction between classes by whom taxes must be paid or upon whom taxes may be imposed, or to recognize for the purposes of taxation any classes that may have been created by the State of New York, or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee because of the greater wealth of the donor of such legacy than is required when the legacy is a gift of a testator of smaller means.

Ninth. Because the said act is in other respects unconstitutional and void.

Tenth. And in so far as the said tax has been imposed upon or collected from said executor by reason of his ownership as executor of the interest in the estate of said deceased, which consists of the Government bonds above mentioned, the defendant has not right or authority to impose or assess any tax whatever upon the same.

X. Upon his information and belief your petitioner further alleges and states that said executor heretofore appealed to the Commissioner of Internal Revenue of the Treasury Department of the United States from the act and requirements of said collector in demanding, collecting, and receiving from said executor said tax or duty upon said estate; but said commissioner has overruled said appeal and rejected the demand of said executor that said tax be refunded.

XI. Your petitioner further states that because of the premises he claims that he have and recover from the United States the sum of eight thousand nine hundred and sixty-nine dollars and two cents (\$8,969.02), together with interest thereon from the time of the filing of this petition, besides the cost of this action, and he prays this honorable court for a judgment or decree upon the facts and law that he have and recover the said sum of eight thousand nine hundred and sixty-nine dollars and two cents (\$8,969.02) and interest from the time of filing this petition (such principal and interest not, however, to exceed in the aggregate ten thousand dollars), together with the costs of this proceeding.

GEORGE D. SHERMAN, *Petitioner.*

PATTERSON, BULKELEY & VAN KIRK,

*Attorneys for Petitioner, 25 North Pearl Street,
Albany, N. Y.*

I, Jane H. Sherman, of Port Henry, Essex county, New York, mindful of the uncertainty of life, and being desirous of making a

disposition of my property in case of death, do make publish and declare this instrument as and for my last will and testament, as follows—

First clause: I direct my executors, hereinafter named, to pay and discharge all my just debts and funeral expenses as soon as practicable after my decease.

Second clause: I give, devise and bequeath to my son, George D. Sherman, all my interest in the real estate situated in the county of Clinton, New York, which I own jointly with one James H. Allen, known and distinguished as the "Pulp Mill property," with all the appurtenances thereunto belonging, including my interest in the personal property therein or thereat and the business connected therewith.

Third clause: I give, devise and bequeath to my grandson, George K. Sherman, the house and lot now used and occupied by me as a residence in the village of Port Henry, New York, with all the appurtenances thereunto belonging, including all my household furniture and utensils, silverware, pictures, ornamental articles, library, beds, bedding and carpets in said house, and also including all my horses, harnesses, carriages and sleighs in the barn on said lot.

I also give, devise and bequeath to my grandson, George K. Sherman, that certain other piece of real estate situated in the town of Moriah, New York, on which William H. Clough resides, known as the "Brook farm," with all the appurtenances thereunto belonging, including all the personal property of every kind on and used in connection with said farm.

10 Fourth clause: I give, devise and bequeath to my grandson, John R. Sherman, my house and lot in the village of Saratoga Springs, New York, which I have used for the past few years in connection with my late husband, George R. Sherman, as a summer residence, with all the appurtenances thereunto belonging, including furniture, carpets, silverware, ornamental articles, and all other personal property therein, together with the harnesses, carriages, sleighs and all other personal property in the barn on said lot. I also give and bequeath to my said grandson, John R. Sherman, all of my interest in the personal property which I own jointly with one James H. Allen in the "Cedar Point store," so called, in the village of Port Henry, New York, and in the business run or conducted therewith.

Fifth clause: I give and bequeath to my sister, Harriet M. Douglass, the sum of twenty thousand dollars (\$20,000).

Sixth clause: I give and bequeath to my cousin, Nellie M. Douglass, the sum of five thousand dollars (\$5,000).

Seventh clause: I give and bequeath to my friend, George T. Murdock, the sum of five thousand dollars (\$5,000).

Eighth clause: I give and bequeath to my nephew, John C. Douglass, the sum of one thousand dollars (\$1,000).

Ninth clause: I give and bequeath to my niece, Alice M. Slavin, the sum of one thousand dollars (\$1,000).

Tenth clause: I give and bequeath to my niece, Theda S. Douglass, the sum of one thousand dollars (\$1,000).

Eleventh clause: I give and bequeath to my niece, Mrs. Alfred Dustensmith, the sum of one thousand dollars (\$1,000).

Twelfth clause: I give and bequeath to Laura Dennis the sum of one thousand dollars (\$1,000).

11 Thirteenth clause: I give and bequeath to Adaline Olcott the sum of one thousand dollars (\$1,000).

Fourteenth clause: I give and bequeath to Bezie Burges the sum of five hundred dollars (\$500).

Fifteenth clause: I give and bequeath to Woodard Pratt the sum of five hundred dollars (\$500).

Sixteenth clause: I give and bequeath to the Sherman Collegiate Institute, at Moriah, New York, the sum of twenty thousand dollars (\$20,000).

Seventeenth clause: I give and bequeath to the Saratoga hospital, at Saratoga, New York, the sum of five thousand dollars (\$5,000).

Eighteenth clause: I give and bequeath to my executors, herein-after named, and to their successor or successors, in trust, for the Moriah Cemetery Association, the sum of twenty-five hundred dollars (\$2,500). The said sum of twenty-five hundred dollars to be invested by my said executors, their successor or successors, and the principal sum, together with the income thereon or any part thereof, to be paid to said association for the purpose of keeping up and maintaining said cemetery as it now exists, in the following manner, viz: One hundred dollars of said twenty-five hundred dollars, together with the income on the whole sum not theretofore paid to said association, each and every year, commencing with the first day of May occurring after my decease, until the whole of said twenty-five hundred dollars and the income thereon shall be paid to said association.

Nineteenth clause: I give and bequeath to my executors, herein-after named, and to their successor or successors, in trust, for the First Presbyterian church, at Port Henry, New York, the sum of six thousand dollars (\$6,000).

12 The said sum of six thousand dollars to be invested by my said executors, their successor or successors, and the said six thousand dollars, together with the income thereon or any part thereof, to be paid to said church in the following manner, viz: Two hundred fifty dollars of said six thousand dollars, together with the income on the whole sum not theretofore paid to said church, each and every year, commencing with the first day of January occurring after my decease, until the whole of said six thousand dollars and the income thereon shall be paid to said church.

Twentieth clause: I give and bequeath to my executors, herein-after named, and to their successor or successors, in trust, for my niece, Mary E. Judd, the sum of twelve thousand dollars (\$12,000). The said sum of twelve thousand dollars to be invested by my said executors and their successor or successors, and the said twelve thousand dollars, together with the income thereon or any part

thereof, to be paid to my said niece in the following manner, viz: one hundred twenty-five dollars of said twelve thousand dollars, together with the income on the whole sum not theretofore paid to her, each and every three months, commencing with the first day of the third month occurring after my decease, until the whole of said twelve thousand dollars and the income thereon shall have been paid to her. And, in the event of the death of my said niece before said twelve thousand dollars and the whole thereof, including any income thereon, shall have been fully paid to her, then and in such case whatever part or portion of said twelve thousand dollars, including any income thereon, at the time of her death and held by my said executors, their successor or successors,

- 13 I give and devise the same to the lawful children of my said niece, issues of her body, then living, absolutely, share and share alike, their heirs and assigns forever.

Twenty-first clause: I give and bequeath to my executors, hereinafter named, and to their successor or successors in trust, for my sister-in-law, Sabra B. Douglass, the sum of six thousand dollars (\$6,000). The said sum of six thousand dollars to be invested by my said executors and their successor or successors, and the said six thousand dollars, together with the income thereon or any part thereof, to be paid to my said sister-in-law in the following manner, viz:

Sixty-two dollars and fifty cents (\$62.50) of said six thousand dollars, together with the income on the whole sum not theretofore paid to her, each and every three months, commencing with the first day of the third month occurring after my decease, until the whole of said six thousand dollars and the income thereon shall have been paid to her. And, in the event of the death of my said sister-in-law before said six thousand dollars and the whole thereof, including any income thereon, shall have been fully paid to her, then and in such case whatever part or portion of said six thousand dollars, including any income thereon shall remain unpaid at the time of her death and held by my said executors their successor or successors, I give and devise the same absolutely to my son, George D. Sherman, my grandson, George K. Sherman, and my grandson John R. Sherman, share and share alike, their heirs and assigns forever.

Twenty-second clause: I give and bequeath to my executors, hereinafter named, and to their successor or successors, in trust, for my daughter-in-law, Jennie L. Sherman, the sum of thirty thousand dollars (\$30,000). The said sum of thirty thousand dol-

- 14 lars to be invested by my said executors and their successor or successors, and the said thirty thousand dollars, together with the income thereon or any part thereof, to be paid to my said daughter-in-law in the following manner, viz: Two hundred fifty dollars (\$250.00) of said thirty thousand dollars, together with the income on the whole sum not theretofore paid to her, at the end of each and every three months, commencing with the first day of the third month occurring after my decease, until the whole of said thirty thousand dollars and the income thereon

shall have been paid to her. And, in the event of the death of my said daughter-in-law before said thirty thousand dollars and the whole thereof, including any income thereon, shall have been fully paid to her, then and in such case whatever part or portion of said thirty thousand dollars, including any income thereon, shall remain unpaid at the time of her death and held by my said executors, their successor or successors, I give and devise the same absolutely to my son, George D. Sherman, my grandson, George K. Sherman, and my grandson, John R. Sherman, share and share alike, their heirs and assigns forever.

Twenty third clause: I give and bequeath to my daughter-in-law, Jennie L. Sherman, twenty (20) shares of the capital stock of the First national bank, of Port Henry, New York.

Twenty-fourth clause: All the rest, residue and remainder of my property, both real and personal, legal and equitable, by whatsoever name known and wheresoever situated, which I may die seized or possessed, or to which I may be entitled at the time of my decease not hereinbefore given or disposed of, I give, devise and bequeath to my executors and trustees, hereinafter named, and to their successors, in trust nevertheless, for the following uses and purposes, viz:

15 First: To pay to my son, George D. Sherman, on the first day of January in each year, commencing on the first day of January after my decease, the full and equal one-third part and portion of the whole net income, rents and profits derived from said trust estate.

Second: To pay my grandson, George K. Sherman, during the lifetime of my said son, George D. Sherman, the full and equal one-third part or portion of the whole net income, rents and profits of said trust estate, to be paid in the manner and at the time specified in the item designated "First" of this clause.

Third: To pay to my grandson, John E. Sherman, during the lifetime of my said son, George D. Sherman, the full and equal one-third part or portion of the whole net income, rents and profits of said trust estate, to be paid in the manner and at the time specified in the item designated "First" of this clause.

Fourth: Upon the death of my said son, George D. Sherman, my said two grandsons him surviving, to pay to my said grandson, George K. Sherman, until he shall arrive at the age of fifty years, the full and equal moiety or half part and portion of the whole net income, rents and profits of said trust estate: and to pay to my said grandson, John R. Sherman the remaining moiety or half part of said net income, rents and profits: each to be paid in the manner and at the time specified in the item designated "First" of this clause.

Fifth: To pay over, assign, transfer and deliver absolutely, in fee-simple, to my said grandson, George K. when he shall attain the age of fifty years, and in case my said son, George D., shall at such time have departed this life, and, if not, then upon his decease thereafter, the full and equal half part and share of the said trust estate. And in the event that my said grandson,

16

George K., shall not survive my said son, George D., or, him surviving, shall not attain the age of fifty years, then and in such case and at and upon the death of both my said son, George D., and my said grandson, George K., the said share and interest of my grandson, George K., in said estate, as hereinbefore designated and determined, shall pass to, vest in and be paid over, assigned, transferred, conveyed and delivered to such person or persons or objects, in such manner and with such rights, interests, limitations, conditions and estate as he may require, direct, create, declare and appoint by his valid last will and testament—or, in default thereof, to his lawful children and issue, him surviving, their heirs and assigns forever, share and share alike.

Sixth: To pay over, assign, transfer, convey and deliver absolutely, in fee-simple, to my said grandson, John R., when he shall attain the age of fifty years, and in case my said son, George D., shall at such times have departed this life, and, if not, then at and upon his decease thereafter, the remaining full and equal moiety or half part of said trust estate. And, in the event that my said grandson, John R., shall not survive my said son, George D., or, him surviving, shall not attain the age of fifty years, then and in such case and at and upon the death of both my said son, George D. and my said grandson, John R., the said share and interest of the said John R. in said estate, as hereinbefore designated and determined, shall pass to, vest in and be paid over, assigned, transferred, conveyed and delivered to such person or persons or objects, and with such rights, interests, limitations, conditions and
 17 estate as he may require, direct, create, deliver and appoint by his valid last will and testament, or, in default thereof, to his lawful children and issue him surviving, their heirs and assigns forever, share and share alike.

Seventh: In the event of the death of either of said grandsons during the lifetime of my said son, George D., then and in such case to pay the one equal moiety or half part of the whole net income, rents and profits of said trust estate to my said son during his lifetime, and the other moiety or half part thereof to the survivor of said grandsons, each to be paid in the manner and at the time specified in item designated "First" of this clause. But if either of my said grandsons shall be deceased intestate, without lawful issue him surviving at the time of the decease of my said son, George D., then and in such case at, upon and after the death of my said son, George D., to pay to the survivor of my said grandsons until he shall attain the age of fifty years the whole net income, rents and profits of said trust estate at the time and in the manner specified in the item designated "First" of this clause, and at and upon the said surviving grandson attaining the age of fifty years the whole of said trust estate shall pass to, vest in and be paid over, assigned, transferred, conveyed and delivered to him. And, in the event that said surviving grandson, after the decease of my said son, George D., shall not attain the age of fifty years, then and in such case the whole of said trust estate shall immediately on the death of said surviving grandson pass to, vest in and be paid over, assigned,

transferred, conveyed and delivered to such person or persons or objects, in such manner and with such rights, interests, limitations, conditions and estate as he may require, direct, create, declare
18 and appoint by his valid last will and testament, or, in default thereof, to his heirs-at-law and next of kin.

Eighth: In the event of the death of both of my said grandsons intestate, and without lawful issue they or either of them surviving, prior to the death of my said son, George D., then and in such case to pay to my said son, George D., during his life the whole net income, rents and profits of said trust estate, at the time and in the manner specified in item designated "First" of this clause, and at and upon his death out of said trust estate to pay to the Sherman Collegiate Institute, at Moriah, New York, the sum of twenty thousand dollars (\$20,000): to pay to the Sherman Free Library, at Port Henry, New York, the sum of ten thousand dollars (\$10,000) and all the rest, residue and remainder of said trust estate shall pass to, vest in and be paid over, assigned, transferred, conveyed and delivered to my heirs-at-law and next of kin, their heirs and assigns forever, in the same proportion or share in all respects as they and each of them would take or receive the same under the statutes of the State of New York in case I had died intestate.

Twenty-fifth clause: I nominate, constitute and appoint George T. Murdock, of Port Henry, New York, and James H. Allen, of Port Henry, New York, executors of this my last will and trustees of the trust estates herein created. And, should either of said trustees refuse or be unable to act as such, or resign his trusteeship, the said trusts, together with the estates and powers hereinbefore granted to the trustees, shall vest in the trustees who shall act. And, should either of said trustees die, the said trust estate, trusts and powers shall vest in the survivor; and, in case of the death of both of

19 said trustees, or of the inability of both to act or refuse to serve, then and in such case the said trust estate, trusts and powers shall vest in such person or persons as may be appointed by the supreme court of the State of New York to succeed them. It is my will and I hereby fix the compensation which my said executors shall receive as follows, viz: The said George T. Murdock shall be entitled to receive, and his compensation is hereby fixed at the sum of three thousand dollars (\$3,000) per annum. Said sum of three thousand dollars (\$3,000) to be paid to him on the first day of January of each and every year, so long as he shall act: and, in addition thereto, and as extra compensation, the said George T. Murdock, for and during the time he shall act as such executor or trustee, shall have the free use of the house and lot which he now occupies in the village of Port Henry, New York. The said James H. Allen shall be entitled to receive, and his compensation is hereby fixed at the sum of two thousand dollars (\$2,000) per annum. Said sum of two thousand dollars (\$2,000) per annum to be paid to said James H. Allen on the first day of January of each and every year, so long as he shall act. The said sum hereby fixed and directed to be paid to my said executors and trustees, to be paid to and received by each of them in lieu of any

and all fees and commissions which they or either of them might become entitled to receive as executors or trustees under this my last will and testament. I hereby authorize and empower my said executors to sell, convey and dispose of, either at public or private sale, and at such times and in such manner and for such sum or sums as to them in the exercise of their best judgment may seem for the best interests of my estate, all or any part of my real or personal estate not hereinbefore specifically devised or disposed of.

20 I further will and direct that neither of my said executors or trustees shall be required to give bonds as such.

Twenty-sixth clause: It is my will, and I hereby direct that, if for any reason the twenty-fourth clause of this will or any provision thereof, is adjudged invalid, then and in that event I give, devise and bequeath all of the property disposed of, or attempted to be disposed of in said twenty-fourth clause, to my said two grandsons, George K. Sherman and John R. Sherman, for and during the term of their natural lives: and, in case of the death of one, then to his successor, and at and after the death of both of said grandsons I give, devise and bequeath the same absolutely, in fee-simple, to their heirs-at-law and next of kin each of said grandsons heirs-at-law and next of kin taking an equal one-half thereof, share and share alike, their heirs and assigns forever.

Twenty-seventh clause: It is my will, and I hereby direct that, should any legatee or devisee under this my will contest the validity hereof or oppose the probate of the same, or directly or indirectly start, institute or prosecute any action or proceeding for the purpose of having this will or any of the provisions thereof adjudged invalid, then any bequest or disposition herein made in favor of any such person or persons shall thereupon cease and be immediately revoked, cancelled and annulled, and all gifts, bequests, disposition or interests made in or to any of my property to such person or persons shall thereupon immediately become and form a part of the rest, residue and remainder of my estate, to be disposed of as hereinbefore directed, and as though such contestant or contestants were actually dead.

21 Twenty-eighth clause: It is my will that in case any direction or provision of this my will should be held illegal or void, or fail to take effect for any reason, no other part of this will shall be thereby invalidated, impaired or affected, but this my will shall be construed and take effect in the same manner as if the invalid direction or provision had not been contained therein: and, should any legacies herein lapse, the same shall go to and form a part of my residuary estate. Lastly, I hereby revoke all former wills and codicils by me at any time heretofore made.

In witness whereof, I have set my hand and seal to this my last will and testament, at Port Henry, New York, the third day of April, in the year one thousand eight hundred ninety-six (1896).

JANE H. SHERMAN. [SEAL.]

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

northern district of New York, a copy of said petition, and also on the 13th day of November, 1899, there was mailed a copy of said petition to the Attorney General of the United States by registered letter, as provided by an act of Congress passed March 3, 1887.

CHARLES F. ROBERSON.

Subscribed and sworn to before me this 18th day of November, 1899.

[L. s.]

C. W. HIGGISON,
Notary Public, Oneida Co., N. Y.

27 United States Circuit Court, Northern District of New York.

GEORGE D. SHERMAN, Plaintiff,
against
THE UNITED STATES OF AMERICA, Defendant. }

Please take notice that I appear for the above-named defendant in the above-entitled action and demand that a copy of all papers and notice in said action be served upon me at my office in Buffalo, N. Y. My post-office address is Buffalo, N. Y.

And the clerk of said court will please enter my appearance in the action as attorney for the defendant.

Dated Buffalo, N. Y., November 16, 1899.

Yours, &c., CHAS. H. BROWN,
*United States Attorney for the Northern District of
New York and Attorney for Defendant ;
O. & P. O. Address, Buffalo, N. Y.*

To Messrs. Patterson, Bulkeley & Van Kirk, att'ys for plaintiff, Albany, N. Y., and to W. S. Doolittle, clerk U. S. circuit court, Utica, N. Y.

28 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman against The United States of America. Copy. Notice of retainer. Charles H. Brown, United States attorney for the northern district of New York and attorney for defendant; office & P. O. address, Buffalo, N. Y. Orig. Filed Nov. 17, '99. W. S. Doolittle, clerk.

29 United States Circuit —, Northern District of New York.

GEORGE D. SHERMAN, Plaintiff,
against
THE UNITED STATES OF AMERICA, Defendant. }

The defendant above named, appearing by Charles H. Brown, United States attorney for the northern district of New York, hereby demurs to the petition or complaint herein, upon the ground

that it appears on the facts of said petition or complaint that the same does not state facts sufficient to constitute a cause of action.

Dated Buffalo, N. Y., November 16, 1899.

CHAS. H. BROWN,
*United States Attorney for the Northern District of
 New York and Attorney for Defendant ;
 O. & P. O. Address, Buffalo, N. Y.*

30 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman against The United States of America. Copy. Demur-er. Demurrers sustained. Nov. 18, 1899. Wm. J. Wallace, U. S. circuit judge. Charles H. Brown, United States attorney for the northern district of New York and attorney for the defendant; office & P. O. address, Buffalo, N. Y. Orig. Filed Nov. 17, '99. W. S. Doolittle, clerk.

31 At a term of the circuit court of the United States of America for the northern district of New York, held at the court-rooms, in the city of Albany, on the 18th day of November, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: Hon. William J. Wallace, circuit judge.

GEORGE D. SHERMAN, Petitioner, }
against
 THE UNITED STATES, Defendant. }

This cause coming regularly on for trial upon the demurrer filed on the 17th day of November, 1899, to the petition duly filed herein, and after hearing Mr. Brown, United States attorney for the northern district of New York, of counsel for the defendant, in support of said demurrer, and Mr. Patterson, of counsel for the petitioner, in opposition thereto, and due deliberation having been had thereon—

It is ordered that the demurrer interposed by the defendant to said petition be, and the same is hereby, sustained.

And it is further ordered that the said petition be, and the same is hereby, dismissed with costs to the defendant, to be adjusted in the usual manner, and the clerk is hereby directed to enter judgment herein in accordance herewith.

WM. J. WALLACE.

32 [Endorsed:] Circuit court of the United States, northern district of New York. George D. Sherman, petitioner, against The United States, defendant. Order sustaining demurrer. Charles H. Brown, U. S. att'y & att'y for def't., Buffalo, N. Y. Orig. Filed Nov. 20, '99. W. S. Doolittle, clerk.

33 United States Circuit Court, Northern District of New York.

GEORGE D. SHERMAN, Petitioner, }
against
 THE UNITED STATES, Defendant. }

The issues in the above-entitled cause having been joined by the defendant's filing a demurrer to the petition, and an order having been entered by the Honorable William J. Wallace, circuit judge, holding court, on the 20th day of November, 1899, directing that the said demurrer be sustained, and dismissing the petition with costs to the defendant, to be taxed, and directing entry of judgment for said costs, and the costs having been taxed by the clerk at the sum of \$10.00, now, on motion of Charles H. Brown, Esq., United States attorney, appearing for the defendant—

It is adjudged that the said demurrer filed in this proceeding by the said defendant to the petition of the plaintiff herein be, and is hereby, sustained, and that the said petition be, and is hereby, dismissed.

And it is further adjudged that the above-named defendant recover of the above-named petitioner the sum of \$10.00, his costs as taxed, and that the judgment be docketed in favor of said defendant and against said petitioner therefor, and that execution be issued against the said petitioner on said judgment.

Judgment signed, entered, and docketed this 20th day of November, 1899, at two o'clock in the afternoon.

W. S. DOOLITTLE, *Clerk.*

34 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman, petitioner, against The United States, defendant. Judgment on demurrer. Charles H. Brown, U. S. att'y & att'y for def't, Buffalo, N. Y.

35 (Indorsement on cover:) United States circuit court, northern district of New York. George D. Sherman against The United States of America. Judgment-roll. Charles H. Brown, U. S. att'y and att'y for def't. Costs, \$10.00. Filed, entered, and docketed this twentieth day of November, 1899, at 2 o'clock in the afternoon. W. S. Doolittle, clerk.

36 In the Circuit Court of the United States for the Northern District of New York.

GEORGE D. SHERMAN, Plaintiff in Error, }
against
 THE UNITED STATES, Defendant in Error. }

And now comes George D. Sherman, and considering himself aggrieved by the judgment entered herein on the 20th day of November, 1899, does hereby pray that a writ of error be allowed from the said judgment, returnable to the Supreme Court of the United States, and that a transcript of the record and proceedings and papers upon which said judgment was made, duly authenti-

ated, may be sent to the Supreme Court of the United States, and he presents herewith his assignment of errors.

CHARLES E. PATTERSON AND
ALPHEUS T. BULKELEY,

*Attorneys for Plaintiff in Error, No. 25 North Pearl Street,
Albany, New York.*

And now, to wit, on November 18th, 1899—

It is ordered that the writ of error be allowed as prayed for.

WM. J. WALLACE,
U. S. Circuit Judge.

37 [Endorsed:] United States circuit court, northern district
of New York. George D. Sherman, pl'ff in error, against
The United States, def't in error. Copy. Petition & order allow-
ing writ of error. Charles E. Patterson & Alpheus T. Bulkeley,
attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y.
Due and personal service of — cop- of the within — admitted this
— day of —, 189—. —, attorney for —. Orig. Filed
Nov. 20, 1899. W. S. Doolittle, clerk.

38 United States Circuit Court, Northern District of New York.

GEORGE D. SHERMAN, Plaintiff in Error, }
against
THE UNITED STATES, Defendant in Error. }

Know all men by these presents that the United States Fidelity
& Guaranty Company of Baltimore, in the State of Maryland, having
a place for the transaction of business in the city of New York, State
of New York, is held and firmly bound unto the United States of
America in the sum of five hundred dollars, to be paid the said
United States of America; for the payment of which, well and truly
to be made, the said company binds itself, its successors and as-
signs, firmly by these presents.

Sealed with its seal. Dated the 18th day of November, in the
year of our Lord eighteen hundred and ninety-nine.

Whereas the above-named George D. Sherman, plaintiff in error,
has prosecuted a writ of error to the Supreme Court of the United
States to reverse a decree rendered in the above-entitled suit by the
judge of the circuit court of the United States for the northern dis-
trict of New York:

Now, therefore, the condition of this obligation is such that if the
above-named George D. Sherman, plaintiff in error, shall
39 prosecute his said writ of error to effect and answer all
damages and costs if he fail to make said appeal good, then
this obligation shall be void; otherwise the same shall be and re-
main in full force and virtue.

THE UNITED STATES FIDELITY &
GUARANTY COMPANY OF BAL-
TIMORE, MARYLAND,

By ALPHEUS T. BULKELY,
JOHN V. McHARG,

Attorneys-in-fact. [L. S.]

Signed, sealed, delivered, taken, and acknowledged this 18th day of November, before me—

EDWIN G. DAY.

Approved as a supersedeas bond.

WM. J. WALLACE, *U. S. C. J.*

40

CITY OF ALBANY,
County of Albany, State of New York, } ⁸⁸ :

On this 18th day of November, 1899, before me personally appeared Alpheus T. Bulkeley & John V. McHarg, attorneys-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland and duly authorized to transact business in the State of New York, with whom I am personally acquainted, who, being by me severally duly sworn, said that they resided in the city of Albany; that they are the attorneys-in-fact of the United States Fidelity and Guaranty Company; that they knew the corporate seal of said company; that the seal affixed to the annexed instrument is such corporate seal; that it was affixed thereto by order of the board of directors of said company, and that they signed said instrument as attorneys-in-fact of said company by like authority; and the said Edwin G. Day further said that he is acquainted with Alpheus T. Bulkeley & John V. McHarg and knew them to be the attorneys-in-fact of said company, and that the signature of the said Alpheus T. Bulkeley & John V. McHarg subscribed to the said instrument is the genuine handwriting of the said Alpheus T. Bulkeley & John V. McHarg, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said Edwin G. Day.

EDWIN G. DAY, [L. S.]

Notary Public, Albany Co., N. Y.

At a special meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company in the city of Baltimore, State of Maryland, on the 29th day of January, A. D. 1898, at which was present a quorum of said directors duly authorized to act in the premises, on motion it was unanimously—

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, Alpheus T. Bulkeley & John V. McHarg, the attorneys-in-fact of the United States Fidelity and Guaranty Company for the county of Albany, Schoharie, Otsego, in the State of New York, be, and each of them is hereby, authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for and on behalf of this company, and to attach thereto the seal of the company, the same to be attested by either one of the said attorneys-in-fact above named as occasion may require.

said tax was imposed denies to the plaintiff in error the equal protection of the laws.

VII. The court erred in refusing to find that the tax so imposed is a direct tax and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

VIII. The said court erred in refusing to find that if said tax is an impost, excise, or duty the law imposing the same is unconstitutional and void because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States.

IX. The court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York.

X. The court erred in refusing to find that in so far as the estate of the deceased consisted of the Government bonds of the United States mentioned in said complaint the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his petition, and which was assessed against the plaintiff in error because of his ownership as executor as aforesaid of such bonds of the Government of the United States.

44 XI. The court erred in refusing to find that it is not within the province of the constitutional powers of the United States or of the Congress to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York, or to create classes which may be lawfully regarded in the imposition of taxes, or to make distinction between classes by whom taxes must be paid or upon whom taxes may be imposed, or to recognize for the purposes of taxation any classes that may have been created by the State of New York, or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee because of the greater wealth of the donor of such legacy than is required when the legacy is a gift of a testator of smaller means.

XII. Because the said act is in other respects unconstitutional and void.

XIII. The court erred in that it refused to find that because of the matters set forth in the petition the plaintiff in error should have and recover from the United States the sum of \$8,969.02, together with interest thereon from the time of filing his petition, besides the costs of this proceeding.

Wherefore the said plaintiff in error prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the circuit court of the United States for the northern district of New York entered in the above-entitled cause.

CHARLES E. PATTERSON AND
ALPHEUS T. BULKELEY,
Attorneys for Plaintiff in Error.

45 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman, pl'ff in error, against The United States, def't in error. Copy. Assignment of error. Charles E. Patterson & Alpheus T. Bulkeley, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. Read. W. J. W. Due and personal service of — cop- of the within — admitted this — day of —, 189—. — —, attorney for —. Orig. Filed Nov. 20, 1899.

46 Circuit Court of the United States, Northern District of New York.

GEORGE D. SHERMAN, Pl'ff in Error, }
against
 THE UNITED STATES, Def't in Error. }

NORTHERN DISTRICT OF NEW YORK, } ss:
County of Albany,

Jennie A. Rouse, being duly sworn, deposes and says that on this 18th day of November, 1899, she served the citation of which annexed hereto is a copy on the Honorable Charles H. Brown, United States attorney for the northern district of New York, an attorney for the defendant in the action mentioned in said citation, by depositing a true copy thereof in the post-office at the city of Albany, New York, properly addressed to the said Charles H. Brown, at Buffalo, New York, properly enveloped, and postage thereon duly prepaid.

JENNIE A. ROUSE.

Sworn to before me this 18th day of November, 1899.

[Seal of Edwin G. Day, Notary Public, Albany County, N. Y.]

EDWIN G. DAY,
Notary Public, Albany County.

47 UNITED STATES OF AMERICA, ss:

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein George D. Sherman is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, in the northern district of New York, on the 18th day of November, 1899, and of the Independence of the United States the one hundred and twenty-fourth.

WM. J. WALLACE,
 — *United States Circuit Court, Northern District of New York.*

48 [Endorsed:] United States circuit court, northern district of New York. George D. Sherman, pl'ff in error, against The United States, def't in error. Original. Citation. Charles E. Patterson & Alpheus T. Bulkeley, Patterson, Bulkeley & Van Kirk, attorneys for pl'ff in error, 25 North Pearl street, Albany, N. Y. Due and personal service of — cop- of the within — admitted this — day of —, 189—. —, attorney for —. U. S. circuit court, N. D. of N. Y. Filed Nov. 20, 1899. W. S. Doolittle, clerk.

49 UNITED STATES OF AMERICA, }
Northern District of New York, } ss :

I, William S. Doolittle, clerk of the circuit court of the United States of America for the northern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George D. Sherman against The United States of America, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Utica, in the northern district of New York, in the second circuit, this twentieth day of November, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the said United States the one hundred and twenty-fourth.

W. S. DOOLITTLE, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled }
{ Nov. 20, '99. W. S. D., clerk. }

Endorsed on cover: File No., 17,573. N. New York C. C. U. S. Term No., 459. George D. Sherman, plaintiff in error, vs. The United States. Filed November 23rd, 1899.

493
S.C.
No. 225.

Office Supreme Court U. S.
FILED

SEP 1 1899

JAMES H. MCKENNEY,
Clerk

Brief of Pence, For
Appellants.

Filed ^{IN THE} Sept. 1, 1899.
Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

SHIRLEY T. HIGH and JESSIE M. HIGH,
Appellants,

vs.

FREDERICK E. COYNE, as Collector of
United States Internal Revenue for
the First District of Illinois, and
ELLEN T. HIGH, as Executrix of the
Last Will and Testament of James
L. High, deceased,

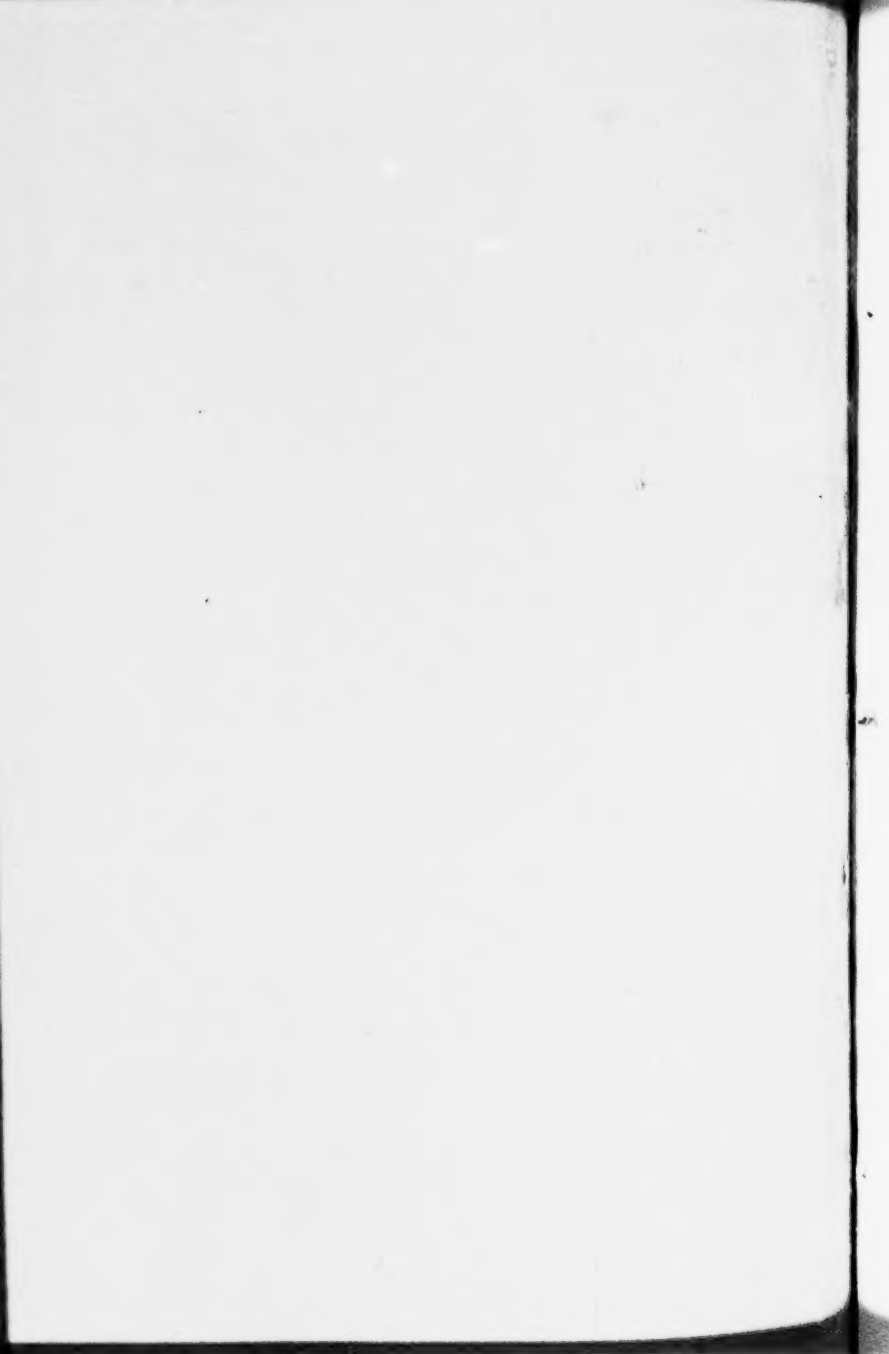
Appellees.

225

BRIEF AND ARGUMENT FOR APPELLANTS.

ABRAM M. PENCE,
GEORGE A. CARPENTER and
SHIRLEY T. HIGH,

COUNSEL FOR APPELLANTS.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

SHIRLEY T. HIGH and JESSIE M. HIGH,

Appellants,

vs.

FREDERICK E. COYNE, as Collector of
United States Internal Revenue for
the First District of Illinois, and
ELLEN T. HIGH, as Executrix of the
Last Will and Testament of James
L. High, deceased,

Appellees.

STATEMENT.

Appellants here filed their bill of complaint in the Circuit Court of the United States for the Northern District of Illinois on the 14th day of February, 1899, against Frederick E. Coyne, as Collector of United States Internal Revenue for the First District of Illinois, and against Ellen T. High, as executrix of the last will and testament of James L. High, deceased, for the purpose of removing a cloud upon their real estate title, and incidentally thereto to have a tax declared null and void, attempted to be levied under and by virtue of section

29 and 30 of an act of Congress, entitled, "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898, creating such cloud, and to enjoin the collector from collecting and the executrix of the estate of Mr. High from paying such tax, and to restrain a breach of trust on the part of such executrix in making such payment. In the bill it is alleged that James L. High, the father of complainants, died October 3, 1898, testate, naming said Ellen T. High as executrix, and that his will has been duly admitted to probate; that in and by said last will, testator devised and bequeathed all his property, real and personal, in equal parts to his wife, said Ellen T. High, and to complainants, Shirley T. High and Jessie M. High, his children; that the real estate so devised and described therein is located in said District, said devisees being in possession thereof; that said James L. High left a large amount of personal property, valued at more than two hundred and fifteen thousand dollars over and above all debts and obligations of said estate.

The bill then sets out sections 29 and 30 of said act of Congress, approved June 13, 1898, relating to the taxation of legacies and distributive shares of personal property hereafter set forth.

Complainants also further set out in their bill of complaint that by virtue of the alleged authority of said act, the defendant, Coyne, as such collector, has made a demand in writing upon said defendant, Ellen T. High, requiring and compelling her, as such executrix, to make and return to said collector a schedule or statement of the legacies and distributive shares of said estate, stating the names of all persons entitled to any beneficial interest therein, and giving the amount of said alleged tax that

has accrued and is due thereon; that said collector is threatening in case said executrix fails or refuses to make and return said schedule or statement that he will make out such list and valuation himself and will assess the tax thereon; and moreover, that he will commence proceedings in the name of the United States against such executrix and will subject the said real and personal property to sale by a decree of court, and that from the proceeds of such sale he will collect the amount of such alleged tax or duty, together with all costs and expenses.

And they further allege that said executrix states and gives out that she intends, as such executrix, to make and return to said collector such schedule or statement of said legacies, together with the amount of the tax alleged to be due thereon, and threatens, intends, and will, unless restrained by an order of this court, pay the amount of said tax to said collector in pursuance of such notice and demand.

They further allege that by the terms and provisions of said act it is provided that such alleged tax or duty shall be a lien or charge for twenty years upon all the property left by any deceased person where the personal estate left by such decedent is by said act made subject to such tax or duty, unless the same be, before that time, fully paid and discharged.

They further allege that by reason of the terms and language of such provision of said act such tax has become and is now a lien and charge upon the real estate so held by complainants as aforesaid, and that it is a cloud or incumbrance upon the title thereto and interferes with the sale and disposition thereof.

They allege that the provisions of said act are uncon-

stitutional, null and void, in that such tax being a direct tax in respect to the property upon which said tax is, by said act, directed to be assessed, is not in and by said act apportioned among the several states as required by sections 2 and 9 of article 1 of the Federal Constitution; that said tax, if not a direct tax, is, nevertheless, unconstitutional, null and void, in that it is not uniform throughout the United States; and in that said act is an unwarranted interference by Congress with the power and rights of the several states to exercise exclusive power in all matters pertaining to the control and regulation of the devise and descent of property; and in that it is an unauthorized assumption by Congress of powers not conferred upon it by the Constitution of the United States.

They further allege that the threatened action of said collector in making out such lists and valuations, and in assessing said tax thereon, and in commencing suit in the name of the United States against said executrix and in subjecting such property, real and personal, to sale upon a decree of court for the payment of said tax, and said threatend act of said executrix will result in great and irreparable loss and injury to complainants for which they would and could have no adequate or proper remedy in a court of law.

Complainants pray that said provisions of said act be declared unconstitutional, null and void, and that the title of complainants to the real estate described be decreed to be free and clear of the lien or charge imposed by said alleged act and from the cloud and incumbrance thereby created and that the executrix be enjoined from making or returning such schedule and from paying such alleged tax, and, as incidental to said relief, that Frederick E. Coyne, the collector, be perpetually enjoined and re-

strained from collecting or attempting to collect such tax and from commencing any proceeding, etc., and from committing any of the acts and things so threatened to be done by him, and for general relief.

A general demurrer was filed to said bill by counsel for the United States, and upon hearing of said demurrer said bill was dismissed for want of equity. The Circuit Court in deciding the same delivered an opinion, which will be found in printed record, page 10.

The sections of the revenue law approved June 13, 1898, relating to the taxation of legacies and distributive shares of personal property, are sections 29 and 30, and read as follows:

“Sec. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, *as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:*

“First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and

every hundred dollars of the clear value of such interest in such property.

“Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

“Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendent of a brother or sister of the father or mother of the person who died possessed, as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

“Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

“Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: PROVIDED, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

“Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall

not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

“Sec. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interests therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to said collector or deputy collector a schedule, list, or statement in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or

receipts duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by the laws of any state or territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector as aforesaid within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property or personal estate, or give the names and relationships of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction

to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof, all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing or supposed to contain any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody, any such records, files or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of \$500; provided, that in all legal controversies where such deed or title shall be the subject of judicial investigation the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law have been complied with by the officers of the government."

Sections 29 and 30 of the Revenue Law of 1898 are an exact copy of sections 124 and 125 of the act of 1864 (see 13 U. S. Stat. at Large, 285, 286), excepting the portions in italics in section 29 of the present act, which are not in the act of 1864, and excepting the rate of taxation imposed, and excepting that the word "collector" in section 30 of the present act was "assessor" in section 125 of the act of 1864; otherwise it is an exact

copy. There is no provision in the act of 1864 increasing the tax on legacies based upon the increased amount of the estate from which the legacies are to be paid, nor were there any exceptions save an exception in favor of husband and wife.

The portion of the act of 1864 relating to succession to real estate, reads as follows (section 126):

“That for the purposes of this act the term ‘real estate’ shall include all lands, tenements and hereditaments, corporeal and incorporeal; that the term ‘succession’ shall denote the devolution of title to any real estate; that the term ‘person’ shall be held to include persons, bodies corporate or associations.”

Section 127 reads as follows:

“That every past or future disposition of real estate by will, deed or laws of descent by reason whereof any persons shall become beneficially entitled in possession or expectancy to any real estate or the income thereof upon the death of any person dying after the passage of this act shall be deemed to confer on the person entitled by reason of any such disposition a ‘succession,’ and the term ‘successor’ shall denote the person so entitled, and the term ‘predecessor’ shall denote the grantor, testator, ancestor or other person from whom the interest of the successor has been or shall be derived.”

Section 128. * * *

Section 129. * * *

Section 130. * * *

Section 131. * * *

Section 132. * * *

Section 133 reads as follows:

“That there shall be levied and paid to the United States in respect of every such succession, as aforesaid, according to the value thereof, the following duties, that is to say: * * *”

Said appellants now assign the following errors:

ASSIGNMENT OF ERRORS.

1. The said Circuit Court erred in holding that the Federal government has the power to tax directly or indirectly the right or privilege granted by the State of Illinois to take by will the legacies in question bequeathed to appellants by the decedent, James L. High, and also in holding that the tax in question is valid and binding upon appellants.

2. The Circuit Court erred in holding that the tax in question is not a direct tax upon the legacies bequeathed out of, or arising from, the personal property left by decedent, James L. High, to appellants by his last will and testament, and also in holding that said tax is valid and binding upon them.

3. The said Circuit Court erred in holding that the tax in question is an indirect tax upon the right or privilege to take by will the legacies in question bequeathed to appellants by the decedent, James L. High, and also in holding that such tax is an excise, duty or impost, and as such is valid and binding upon appellants.

4. The said Circuit Court erred in holding that the tax in question is an indirect tax and is uniform throughout the United States, and also in holding that the tax in question is valid and binding upon appellants.

5. The said Circuit Court erred in not holding that the tax in question is unconstitutional and void and not binding upon appellants.

6. The said Circuit Court erred in holding the tax in question to be constitutional and binding upon appellants.

7. The said Circuit Court erred in dismissing appellants' bill of complaint for want of equity.

Wherefore, they pray that said cause may be reversed and remanded and that they may be restored to whatever they may have lost by reason of said decree.

BRIEF.

I.

JURISDICTION.

The Circuit Court of the United States has power to entertain jurisdiction to remove a cloud upon title to real estate, and incidentally to restrain the collection and payment of an unconstitutional tax creating such cloud and to restrain and control an executrix in the administration and threatened breach of a trust. If a bill be demurrable for want of equity, still if the court possesses the power to adjudicate upon the subject brought into controversy, and if the defendant submits to such jurisdiction and does not raise the question that there is a remedy at law by proper pleading, then this court cannot raise it for the first time, especially where counsel for defendant waives the question or does not raise it.

Pollock v. Farmers' Loan & Trust Co.,
157 U. S., 553.

Holland v. Challen, 110 U. S., 15.

Hollins v. Brierfield C. & I. Co., 150 U.
S., 371.

Shelton v. Platt, 139 U. S., 591.

Reynolds v. Crawfordsville Bank, 112 U.
— S., 405.

United States v. Wilson, 118 U. S., 86.

Cummings v. National Bank, 101 U. S.,
153.

Union Pacific Ry. Co. v. Cheyenne, 113
U. S., 525.

Allen v. Hanks, 136 U. S., 300.

II.

The United States Government cannot tax the right or privilege of inheritance, which is not a common right, but is the creation of the state legislature, and such privilege or right of inheritance exists by virtue of the exercise of a power reserved to the state; and to permit such a privilege or right to be taxed implies the right on the part of the general government to retard, impede, burden, control, abridge and destroy the operation of a constitutional law, enacted by the state legislature, to carry into execution the powers vested in the state government.

Collector v. Day, 11 Wall., 124.

United States v. R. R. Co., 17 Wall., 327.

Friedman v. Siegel, 10 Blatch., 327.

Fifield v. Close, 15 Mich., 505.

Warren v. Paul, 22 Ind., 276.

State v. Garton, 32 Ind., 1.

Smith v. Short, 40 Ala., 385.

Jones v. Keep, 19 Wis., 369.

Sayles v. Davis, 22 Wis., 225.

Moore v. Quirk, 105 Mass., 49.

Weston v. Charleston, 2 Pet., 449.

M' Culloch v. Maryland, 4 Wheat., 431,
439.

Bank of Commerce v. New York City, 2
Black, 620.

Ward v. Maryland, 12 Wall., 418, 427.

Railroad Co. v. Peniston, 18 Wall., 5.

United States v. Perkins, 163 U. S., 625.

Magoun v. Illinois Trust and Savings Bank,
170 U. S., 283.

California v. Pacific R. R. Co., 127 U. S., 40.

Harman v. Chicago, 147 U. S., 396.

Moran v. New Orleans, 112 U. S., 69.

Van Brocklin v. Tennessee, 117 U.S., 151.

III.

The tax in question is direct and hence subject to the rule of apportionment among the states as provided in the constitution, and this tax being unapportioned is therefore unconstitutional.

(a) *The tax in question purports to be a direct tax upon the legacy or distributive share and not a tax upon the right to inherit or take by will.*

Act of Congress, June 13, 1898, Sec. 29 and 30.

Act of Congress, 1864, 13 U. S. Stat. at Large, 285, 286. Sec. 124 & 125.

Gibbons v. Ogden, 9 Wheat., 1.

Rhode Island v. Massachusetts, 12 Pet., 731.

Martin v. Hunter's Lessee, 1 Wheat., 904.

Waller v. Harris, 20 Wend., 561.

Sedgwick's Statutory Law, 260.

Cooley on Taxation (2d Ed.), 266, 268.

Pollock v. Farmers' Loan and Trust Co., 157 U. S., 429.

Same v. Same, 158 U. S., 601.

Scholey v. Rew, 23 Wall., 331.

Hylton v. United States, 3 Dall., 171.

United States v. Perkins, 163 U. S., 625.

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283.

(b) *The tax in question does not fall within the definition of an "excise, a duty or an impost" within the meaning of the constitution.*

Attorney General v. Reed, L. R. 10 Appeal Cases (Privy Council), 141.

Bank of Toronto v. Lambe, L. R. 12 Appeal Cases (Privy Council), 575, 581.

Pollock v. Farmers' Loan & Trust Co., 157 U. S., 558.

Same v. Same, 158 U. S., 631.

Political Economy, by John Stuart Mill (Ed. by Laughlin), pp. 550, 562.

36 Federalist (Ed. by J. C. Hamilton), p. 275.

Nicol v. Ames, 173 U. S., 509.

Brown v. State of Maryland, 12 Wheat., 419.

Cook v. Pennsylvania, 97 U. S., 566.

Almsy v. California, 24 How., 169.

IV.

There is a lack of uniformity in the taxation of the classes of persons and property provided for in section 29 of this act. The constitution provides that "All duties, imposts and excises shall be uniform throughout the United States." Not only is there lack of uniformity in the classes provided for but there is a lack of uniformity created by the exemptions of the statute.

Gulf, Col. & Santa Fe R. R. Co. v. Ellis, 165 U. S., 150.

Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S., 232.

- Giozza v. Tiernan*, 148 U. S., 657.
- Kentucky Railroad Tax Cases*, 115 U. S., 321.
- Hallinger v. Davis*, 146 U. S., 314.
- Barbier v. Connolly*, 113 U. S., 27.
- Mugler v. Kansas*, 123 U. S., 623.
- Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283.
- State v. Ferris*, 53 Ohio St., 314.
- Cooley's Constitutional Limitations (5th Ed.), *p. 515.
- Cooley on Taxation (2d Ed.), pp. 214, 215.
- Sutton's Heirs v. City of Louisville*, 5 Dana (Ky.), 28, 31.
- City of Lexington v. McQuillan's Heirs*, 9 Dana (Ky.), 513.
- Barbour v. Louisville Board of Trade*, 82 Ky., 645, 653.
- State v. Indianapolis*, 69 Ind., 375.
- Opinion by Field, J., Income Tax Cases, 157 U. S., 592.

ARGUMENT.

I.

JURISDICTION.

The Circuit Court of the United States has power to entertain jurisdiction to remove a cloud upon title to real estate and incidentally to restrain the collection and payment of an unconstitutional tax creating such cloud; and to restrain and control an executrix in the administration or threatened breach of a trust even if the allegations of the bill be insufficient; in other words, if it be demurrable for want of equity, still if the court possesses the power to adjudicate upon the subject brought in controversy and if the defendant submits to such jurisdiction and does not raise the question that there is a remedy at law by proper pleading, then this court cannot raise it for the first time, especially where counsel for defendant waives the question or does not raise it.

Pollock v. Farmers' Loan and Trust Co.,
157 U. S., 553.

Holland v. Challen, 110 U. S., 15.

Hollins v. Brierfield C. & I. Co., 150
U. S., 371.

Shelton v. Platt, 139 U. S., 591.

Reynolds v. Crawfordsville Bank, 112
U. S., 405.

United States v. Wilson, 48 U. S., 86.

Cummings v. National Bank, 101 U. S.,
153.

Union Pacific Ry. Co. v. Cheyenne, 113
U. S., 525.

Allen v. Hanks, 136 U. S., 300, 311.

The *Pollock* case, the *Income Tax* cases, 157 U. S., 553, was a suit brought in equity to enjoin the payment of an unconstitutional tax, and this court sustained the jurisdiction of the Circuit Court as well as its own jurisdiction.

In that case Mr. *Chief Justice Fuller* said:

"The jurisdiction of a court of equity to prevent *any threatened breach of trust* in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained. *Dodge v. Woolsey*, 18 How., 331; *Harves v. Oakland*, 104 U. S., 450.

"As in *Dodge v. Woolsey*, this bill proceeds on the ground that the defendant would be guilty of such breach of trust or duty in voluntarily making returns for the imposition of, and paying, an unconstitutional tax; and also on allegations of threatened multiplicity of suits and irreparable injury."

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees if it could be entertained at all at this stage of the proceedings; and so far as it was within the power of the government to do so, the question of jurisdiction for the purposes of the case was explicitly waived on the argument."

In *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S., 371, 380, this court, speaking by Mr. *Justice Brewer*, said:

"Defenses existing in equity suits may be waived, just as they may in law actions, and, when waived, the cases stand as though the objection never existed. Given a suit in which there is jurisdiction of the parties, in a matter within the general scope of the jurisdiction of courts of equity, and a decree rendered will be binding, although it may be apparent that defenses existed which, if presented, would have resulted in a decree of dismissal. * * * If there was a defense existing to the bills as framed, an objection to the right of these plaintiffs to proceed on the ground that their legal remedies

had not been exhausted, it was a defense and objection which must be made *in limine*, and does not of itself oust the court of jurisdiction. This doctrine has been recognized not merely in the cases cited, but also in those of *Reynes v. Dumont*, 130 U. S., 354; *Kilbourn v. Sunderland*, 130 U.S., 505; *Brown v. Lake Superior Iron Co.*, 134 U. S., 530. None of these cases question the proposition that if the objection is seasonably presented it will be effective."

This court in *Sheldon v. Platt*, 139 U. S., 591, said (p. 594) by Mr. Chief Justice FULLER:

"It was ruled in *Dows v. Chicago*, 11 Wall., 108, 112, that a suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal, but that there must exist, in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, *throw a cloud upon the title of the complainant.*"

In the same case, the Chief Justice, quoting from the opinion of *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S., 516, the language of Mr. Justice Bradley, said:

"Cases of *fraud*, accident or mistake, cases of *cloud upon the title of one's property* and cases where *one is threatened with irremediable mischief*, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in the courts of equity.'"

As above stated, it is a universal principle that where there is *fraud* or where the tax sought to be enjoined is a cloud upon the title, that courts of equity will entertain jurisdiction to remove such cloud.

In *Union Pacific Ry. Co. v. Cheyenne*, 113 U. S., 525, the court said:

“It cannot be denied that bills in equity to *restrain the collection of taxes illegally imposed have frequently been sustained*. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of taxpayer's lands, the loss of his freehold by means of the tax sale would be a mischief hard to be remedied. *Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief.*”

Aside from the unconstitutionality of the law as alleged by us as a basis for injunction, which was not granted, we have set out various circumstances in our bill which show that no adequate remedy at law could be obtained. It is alleged in this case that the collector has made a demand upon the executrix requiring and compelling her to make a return to the collector, stating the names of all persons entitled to any beneficial interest therein, and giving the amount of said alleged tax that has accrued and is due thereon; that said collector has threatened, in case the executrix fails and refuses to make a return of such schedule and statement, that he will make out such list and valuation himself and will assess the tax thereon, and that he will commence proceedings in the name of the United States against said executrix as being the person who has such personal

property in her actual and constructive possession, and will subject the same to be sold by a decree of the court and that from the proceeds of such sale he will collect the amount of such alleged tax or duty, together with costs and expenses.

That the executrix states and gives out that she intends, as such executrix, to make a return to the collector as required, and threatens, and intends, and will, unless restrained by an order of this court, pay the amount of said alleged tax to said collector in pursuance of such notice and demand.

The bill points out that the alleged tax or duty is a lien or charge for twenty years upon all the property left by any deceased person, and that, in pursuance of the provisions of said law, said supposed tax has become and now is a lien and charge upon the real estate so held by appellants, and devised to them by the decedent, and that it is a cloud or incumbrance upon their title to the real estate and interferes with the sale and disposition thereof.

That the law is unconstitutional and void for the reasons stated in the bill.

That the threatened action of said collector in assessing said tax and commencing suit against the executrix and in subjecting such property, both real and personal, to be sold upon a decree of the court for the payment of said tax and said threatened action of the executrix to pay the same will result in great and irreparable loss and injury to complainants, for which they have no adequate remedy at law.

It is sufficient to state that this tax is a cloud upon the title of complainants, and being so, a court of equity has jurisdiction to remove the same.

All the facts constituting such cloud are fully set out in the bill and hence we bring ourselves clearly within the principles laid down by this court governing a court of equity in such cases.

The enjoining of the payment of the tax is incidental to the relief sought to remove the tax as a cloud and to declare it so, even though no injunction were prayed; and a court of equity has jurisdiction to remove this cloud and complainants have a right to come into a court of equity for that purpose independent of any question of injunction restraining the collection of the tax.

It would seem to us, also, that a tax law which is unconstitutional does not fall under the condemnation of the statute of the United States which provides that

“No suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court.”

That if the law be unconstitutional it is the same as if it were never written upon the statute book and that cannot be called a tax which has no authority of law whatever any more than if the page of the book where it is written were a blank. Surely the government of the United States cannot, like the baron robbers, levy reprisals and contributions without authority of law, and to say that the officers of the government who are attempting to enforce a contribution for which there is no law whatever, cannot be enjoined but could protect themselves by pleading the statute in question would be a travesty upon justice. Any such effort on the part of an officer of the United States would be a *fraud*, and the bill could be well maintained on the ground of fraud alone as was declared by this court in *Union Pacific Ry. Co. v.*

Cheyenne, supra, quoting from Judge Cooley on Taxation, in which this court, adopting such language, says:

“Cases of *fraud*, accident or mistake, cases of cloud upon the title to one's property and cases where one is threatened with irremediable mischief may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.”

If such an effort of an officer in such a supposed case were not a fraud, it would be difficult to imagine of any case in the world being a fraud. The government could not be responsible for its officers making such reprisal against citizens, as there would be no pretended authority for any such action of its officers. It would be the boldest robbery to permit such an officer to levy such a contribution if there were no word of authority in the statute books authorizing it, and the law being unconstitutional, we must consider the page of the statute book as a blank upon this question. Moreover, this court holds that where there is a trust and the beneficiaries are threatened with damage, that a bill in equity will lie to prevent a breach of such trust, as was stated by this court in the *Income Tax* cases.

Surely if this law be unconstitutional then the act of the executrix, who is trustee, would be the broadest violation of the trust conferred upon her, and hence a court of equity would interfere in the administration of such trust and prevent the trust property from being squandered.

But the grounds upon which this bill may be maintained are so numerous and well defined that it is useless further to discuss them. The solicitor general has informed us that he will make no point as to the jurisdiction of the court, and, as we understand, the government is anxious to have the case disposed of as it is interfering with the collection of the taxes arising under this law.

II.

The United States Government cannot tax the right or privilege of inheritance, which is not a common right but is the creation of the state legislature, and such privilege or right of inheritance exists by virtue of the exercise of a power reserved to the states; and to permit such a privilege or right to be taxed implies the right on the part of the general government to retard, impede, burden, control, abridge and destroy the operation of constitutional laws enacted by the state legislature to carry into execution the powers vested in the state government.

Collector v. Day, 11 Wall., 124.

United States v. Railroad Co., 17 Wall., 327.

Friedman v. Siegel, 10 Blatchford, 327.

Fifield v. Close, 15 Mich., 505.

Warren v. Paul, 22 Ind., 276.

State v. Garton, 32 Ind., 1.

Smith v. Short, 40 Ala., 385.

Jones v. Keep, 19 Wis., 369.

Sayles v. Davis, 22 Wis., 225.

Moore v. Quirk, 105 Mass., 49.

The states have no power by taxation or otherwise to retard, impede, burden or in any manner control the operation of constitutional laws enacted by Congress to carry into execution the powers granted to or vested in the general government of the United States.

Weston v. Charleston, 2 Pet., 449.

M'ulloch v. Maryland, 4 Wheat., 431, 439.

Bank of Commerce v. New York City, 2 Black, 620.

Ward v. Maryland, 12 Wall., 418, 427.
Railroad Co. v. Peniston, 18 Wall., 5.

Chief Justice MARSHALL, in *McCulloch v. Maryland*,
 4 Wheat., 436, says:

“The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power by taxation, or otherwise, to retard, impede, burden or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.”

It was in the same case that Chief Justice Marshall said that “the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create.”

He also said in the same opinion that “A power to create implies a power to preserve. That a power to destroy, if wielded by a different hand, is hostile to and incompatible with those powers to create and preserve.”

He also said: “That the power of taxing it (the United States Bank) by the states may be exercised so as to destroy it, is too obvious to be denied.”

It was in the same case that he laid down the proposition that the power of the general government granted to it by the constitution makes all its laws the supreme laws of the land, saying:

“It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in the subordinate government as to exempt its own operation from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain.”

Hence it follows in the case at bar that if the general government has the power to tax the privilege or right of inheritance under the state laws, it may destroy that privilege or right by its taxation. It has the power, if the law be constitutional, to levy a tax for the full amount of the distributive shares or of the legacies given by the law of the state, and hence by the possession of such a power, by taxation of this privilege or right, it tends to retard, impede, burden and control the operation of state laws, and tends to prevent the carrying into execution of the powers vested in the state government. If the power exists on the part of the general government to do this, it necessarily follows that the general government can destroy the power of the state to create inheritances and the right to take by will.

And hence it interferes with the rights reserved to the states under the constitution because it will not be contended that the general government has the right to establish or regulate inheritances or the right to take by will. This is not one of its powers but it is the power which has been reserved in the constitution to the states themselves. In the State of Illinois and other states there are state inheritance tax laws, and if the general government also possess the power to tax the same right so taxed by the state, then inasmuch as the law of Congress is the supreme law of the land, Congress can abridge or destroy the power of the state and deprive it of any tax under its own law upon a subject created by the state.

In *Weston v. Charleston*, 2 Pet., 467, Chief Justice MARSHALL quotes and affirms the language used in the *McCulloch* case as follows:

“ ‘The states have no power by taxation or other-

wise to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

And the Chief Justice said in that case (p. 467):

"We retain the opinions which were then expressed."

And in the same case the Chief Justice said:

"*The sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission.*"

If this be true, then, the state's sovereignty extends over the right of inheritance, which cannot be abridged or controlled by the Federal government.

Mr. Justice Nelson in the case of *Bank of Commerce v. New York City*, 2 Black, 632, in referring to the decision of Chief Justice Marshall in the *Weston* case, said:

"It was considered (in that case) as a necessary consequence of the supremacy of the Federal government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting power of the states, and that the powers of the state cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this government may rightfully adopt.

"He further said that 'the sovereignty of a state extends to everything which exists by its own authority or is introduced by its permission, but not to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States.'"

Then, after referring to the *McCulloch* case and others, the court said (p. 632):

"The doctrine maintained in those cases is that the powers granted by the people of the states to the general government and of the states to the general

government, and embodied in the constitution, are supreme within their scope and operation, and that this government may exercise these *powers in its appropriate department*, free and unobstructed by any state legislation or authority; that within this limit this government is sovereign and independent, and any interference by the state governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the constitution which makes the constitution and laws of the United States passed in pursuance thereof the supreme law of the land."

And Mr. Justice NELSON further said in that case that,

"The conclusive answer to the attempted exercise of state authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, executive, *legislative* or judicial, whether it is a government of enumerated powers like this one or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. * * * *And the principle is equally true in respect to every other power or function of a government subject to the control of another.*"

And at the end of his opinion Mr. Justice NELSON said:

"Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or *functions exercised.*"

The same principles are again reviewed and affirmed in *Railroad Company v. Peniston*, 18 Wall., 5. And, speaking of that class of subjects

where the right to tax is concurrent in both the general and state governments, Mr. Justice Strong lays down the principle that the claim of the United States government, as the supreme authority, must be preferred, and that "There is nothing in the constitution which contemplates or authorizes any direct abridgement of this power by state legislation," and as bearing upon the questions here involved, Mr. Justice STRONG says (p. 30):

"While it is true that government cannot exercise its power of taxation so as to destroy the state governments or embarrass their lawful action, it is equally true that the states may not levy taxes, the direct effect of which shall be to hinder the exercise of any power which belonged to the national government."

And then he says, p. 31:

"The states are, and they must ever be, co-existent with the national government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. *Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the states or prevent their efficient exercise.*"

It will be observed from the quotations made as to the powers of the general government that these decisions also discuss the correlative power of the state governments and recognize the fact that the general government would have no power to retard, impede, burden, control, abridge or destroy the powers of the state government or any of its departments, *legislative*, judicial or executive, any more than the latter would have the right to so legislate as to retard, impede, burden, control, abridge or destroy the powers of the general government.

The principle certainly cannot be denied. The diffi-

culty only is in the application. The principle, however, is well recognized in other cases decided by this court, that the powers of the state governments cannot be interfered with by the general government. If the state government has the constitutional power to legislate upon any subject and thereby to create rights and privileges which do not exist *as a common right*, then the general government cannot legislate so as to affect the same subject in its attempts to carry out the powers actually conferred upon the general government. This is the limitation placed of necessity upon the powers actually conferred upon the general government by the constitution, that the general government cannot, in carrying out the power so conferred in any manner limit or control rights and powers which are vested in the state government, where the subject in controversy is the creation of state legislation, and cannot and does not exist without such state legislation; as, for instance, in the case at bar where the right to inherit and the right to take by will do not exist as of common right but only have an existence when created by the state government.

But in addition to these decisions already quoted from, we have the express decision of this court that the general government can no more interfere with these powers vested in the state government than the state government can interfere with the powers vested in the general government.

In *Collector v. Day*, 11 Wall., 113, the question arose as to the constitutionality of the revenue law passed in 1864 imposing a tax upon the income of all persons, whereby a tax was levied upon Day, as Judge of the Probate Court in the State of Massachusetts. His salary

was fixed by law and payable out of the treasury of the state. *Justice Nelson* delivered the opinion of this court.

"It is conceded," he said, "that there is no express constitutional prohibition upon the states against taxing the means or instruments of the general government. But it was held in *McCulloch v. Maryland*, and we claim properly held, to be prohibited by necessary implication; otherwise the states might impose taxation to an extent that would impair, if not wholly defeat, the operation of the Federal authorities, when acting in their appropriate sphere. These views, we think, abundantly establish the soundness of the decision in the case of *Dobbins v. Commissioners of Erie*, 16 Pet., 435, which determined that the states were prohibited upon a proper construction of the constitution from taxing the salaries or emoluments of an officer of the United States, and we shall now proceed to show that upon the same construction of that instrument, and for like reasons, that government is prohibited from taxing the salary of a judicial officer of the state.

"It is a familiar rule of construction of the Constitution of the Union that the sovereign powers vested in the state governments by their respective constitutions remained unaltered and unimpaired, except so far as they were granted to the government of the United States. That the intention of the framers of the constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the Tenth Article of the Amendments, viz: '*The powers not delegated to the United States are reserved to the states respectively or to the people.*' The government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication.

"The general government and the states, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independent of each other within their respect-

ivespheres. The former in its appropriate sphere is supreme; but the states, within the limits of their powers, not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the states. * * * Two of the great departments of the government, the executive and *legislative*, depend upon the exercise of the powers or upon the people of the states. The constitution guarantees to the states a republican form of government and protects each against violence. Such being the separate and independent condition of the states in our complex system as recognized by the constitution, and the existence of which is so indispensable, that without them the general government itself would disappear from the family of nations, it would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments for preserving their existence, *and fulfilling the high and responsible duties assigned to them in the constitution* should be left free and unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, *which power acknowledges no limits*, but the will of the legislative body, imposing the tax, and more especially those means and instrumentalities *which are the creation of their sovereign and reserved rights*, one of which is the establishment of the judicial department and the appointment of officers to administer their laws. Without this power and the exercise of it we risk nothing in saying that no one of the states under the form of government guaranteed by the constitution could long preserve its existence. A despotic government might. * * * Thirteen states were in possession of this power (to establish a judicial department) and had exercised it at the adoption of the constitution; and it is not pretended that any grant of it to the general government is found in that instrument. It is, therefore, one of the sovereign powers vested in the states by their con-

stitutions which remained unaltered and unimpaired and in respect to which the state is as independent of the general government as that government is independent of the states. * * * The two governments are upon an equality, and the question is whether the power 'to lay and collect taxes' enables the general government to tax the salary of a judicial officer of the state, which officer is a means or instrumentality employed to carry into execution some of its most important functions, the administration of the law, and which concerns the exercise of a right reserved to the states.

We do not say that the mere circumstances of the establishment and appointment of officers to administer the laws being among the reserved powers of the state, disables the general government from levying the tax, as that depends upon the express power 'to lay and collect taxes,' but it shows that it is an original, inherent power, never parted with, and in respect to which the supremacy of that government does not exist and is of no importance in determining the question; and further, that being an original and reserved power and the judicial officers appointed under it being a means of instrumentality employed to carry it into effect, the right and necessity of its unimpaired exercise and the exemption of the officer from taxation by the general government stand upon as valid a ground and are maintained by principles and reasons as cogent as those which led to the exemption of the Federal officers in *Dobbins v. The Commissioners of Erie* from taxation by the states; for in that respect, that is, in respect to the reserved powers, the state is as sovereign and independent as the general government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessary, and for the sake of self-preservation exempt from taxation by the states, why are not those of the states, depending upon their reserved powers, for like reasons, equally exempt from Federal taxation? Their unimpaired existence in the one case is as essential as in the other. *It*

is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the states, nor is there any prohibiting the states from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great law of self preservation; as any government whose means employed in conducting its operation, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The court then referring to the decision of the *Veazie Bank v. Fenno*, *supra*, where Justice Nelson dissented, said:

"But notwithstanding the sanction of this taxation by a majority of the court (in that case) it is conceded in the opinion that 'the reserved rights of the states, such as the right to pass laws; to give effect to laws through executive action; to administer justice through the courts and to employ all necessary agencies for legitimate purposes of state government, are not proper subjects of the taxing power of Congress.' This concession covers the case before us, and adds the authority of this court in support of the doctrine which we have endeavored to maintain."

The foregoing decision, therefore, establishes the converse of the proposition laid down by Chief Justice Marshall in *McCulloch v. Maryland*, *supra*, which was conceded, however, in that case, and if the state governments stand upon the same basis as the general government touching the question of "the right to pass laws" upon any particular subject, and to carry them into effect. and that such right can not be taxed by the general government, then this very case falls within the

exemption claimed, from the necessity of the case, and the provision of the Constitution of the United States which confers express power "to lay and collect taxes" does not apply in this case.

It would seem there should be no question upon this subject, because if the general government can tax the right given by the laws of the State of Illinois or any other state to inherit, or the right to make laws on a particular subject and carry them into operation, then the power of taxation upon such right to inherit or make laws and carry them into operation is a power which may be used to destroy the right, and to retard, impede, burden, control, abridge and destroy the operation of constitutional laws enacted by the state. If it be true, then, as stated by Justice Nelson in the *Day* case, that the right of the states is just as well established as is the right of the general government to be exempt from control of any other government, such as the right to pass laws which are constitutional, then by changing the language of Chief Justice Marshall in *McCulloch v. Maryland*, *supra*, so as to state the converse of this proposition asserted by Chief Justice Nelson, we have the following:

"The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the United States has no power by taxation or otherwise to retard, impede, burden or in any manner control the operations of the constitutional laws, enacted by the states, to carry into execution the powers vested in the state governments."

In the case of *United States v. Railroad Co.*, 17 Wall., 322, a tax was levied by the Federal government upon a railroad company created by the state on account of the indebtedness created by the railroad, and the corporation

was authorized under the law to retain such tax out of the dividends declared in payment of the interest upon such indebtedness. The City of Baltimore subscribed for a certain amount of the bonds for the Baltimore and Ohio Railway, and loaned its credit to said railway to the extent of the bonds issued to it. The city owned the bonds, and the attempt was to collect the tax upon the same from the railroad corporation, which corporation was authorized to retain such tax in making payments of interest or dividends. The corporation was made use of simply as a convenient means of collecting the tax. It was held by this court that a municipal corporation is a portion of the sovereign power of the state and is not subject to taxation by Congress upon its municipal revenues, and in the course of the opinion by Mr. Justice Hunt the court said:

“The power of taxation by the Federal government upon the subjects and in the manner prescribed by the act we are considering is undoubted. There are, however, certain departments which are excepted from the general power. The rights of the states to administer their own affairs through their *legislative*, *judicial* and executive departments in their own manner through their own agencies is conceded by the uniform decisions of this court, and by the practice of the Federal government from its organization. This carries with it an exemption of those agencies and instruments from the taxing power of the general government. If they may be taxed lightly, they may be taxed heavily; if justly, oppressively. Their operation may be impeded and may be destroyed if any interference is permitted.”

The foregoing cases illustrate the principle we are discussing, namely, that the power of legislation on the part of the state, and the power to grant rights and privileges touching the subject in question may not be retarded, im-

peded, burdened or in any manner controlled, nor can the operation of the constitutional laws passed by the state to carry into execution the powers vested in the state governments be taxed by the general government or in any way interfered with. This is the principle clearly announced in all the foregoing cases.

May the power of the state to pass inheritance laws and to grant rights and privileges to legatees and next of kin upon the principles before established be impeded or burdened or retarded or abridged in any manner by the general government? The tax in question, as we have seen, does interfere with, retard and impede the execution of the power so reserved to the state government. The power to pass laws of inheritance is a privilege possessed only by the state and the privilege of taking by inheritance does not exist except by virtue of the exercise of such power by the legislature. This proposition is clearly determined by the cases of

United States v. Perkins, 163 U. S., 625.

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283.

In *United States v. Perkins*, *supra*, this court discussed the character of the power vested in the legislature of the state to grant the privilege of inheritance and determined that this privilege was not a matter of *common right* but it was a privilege obtained from the state, which alone possessed the right and the power to determine and establish a rule of inheritance.

Mr. Justice Brown, in delivering the opinion, said:

“While the laws of all civilized states recognize in every citizen *the absolute right to his own earnings and to the enjoyment of his own property, and to the increase thereof during his life* except so far

as the state may require him to contribute his share for public expenses, *the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control.*"

And the court also said:

"In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that in the exercise of that power he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain but subject to a *condition* that the state has a right to impose. Certainly if it be true that the right of testamentary disposition is purely statutory, the state has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property in the ordinary sense of the term but upon the right to dispose of it and it is not until it has yielded its contribution to the state that it becomes the property of the legatee. * * * This, therefore, is not a tax upon the property itself, but is merely the price exacted by the state for the privilege accorded in permitting property so situated to be transferred by will or by descent or by distribution. * * *

Such a tax was also held by this court to be free from any constitutional objection in *Mager v. Grima*, 8 How., 490-493, Mr. Chief Justice TANEY remarking that 'the law in question is nothing more than an exercise of the power which every state and sovereignty possesses of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * *

If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes would be required by its interest or policy.'"

And in *Magoun v. Illinois Trust and Savings Bank*,

supra, this court in the discussion of a similar question as to the meaning and operation of an inheritance law, said, speaking by Mr. Justice McKENNA, as follows (p. 288):

“It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on successions. 2. The right to take property by devise or descent *is the creature of the law, and not a natural right—a privilege*—and, therefore, the authority which confers it may impose conditions upon it.”

“From these principles it is deduced that the *states* may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.”

The learned justice then quotes what was said by Mr. Justice BROWN in *United States v. Perkins*, namely:

“That while the laws of all civilized states recognize in every citizen the absolute right to his *own* earnings and to the enjoyment of his *own* property, and to the increase thereof *during his life*, except so far as the state may require him to contribute his share for public expenses, *the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control.*”

The court then quotes from the case of *Curry v. Spencer*, 61 N. H., 624, as follows:

“Wills, therefore, testaments, the rights of inheritance and succession, are all of them *creatures of the civil or municipal law*, and accordingly are in all respects regulated by them.”

These two cases show that this court considered the right of inheritance and the right to take by will *not as a common right—a natural right*—guaranteed by the constitution, but as a privilege within the

power of the state legislature to grant or withhold, and being a privilege it follows that it cannot be retarded, burdened or controlled in any way by the general government, and the right to levy such a tax, if it exists, would be a right to destroy or to control and burden the power contained in the legislature granting the privilege, and hence would be unconstitutional under the foregoing decisions.

This right or privilege of inheritance granted by the sovereign power of the state possesses the same virtues and is of the same essence as a franchise. A franchise must be granted by a sovereign authority; and it was held in the *Bank of Augusta v. Earl*, 13 Pet., 519:

It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state."

And the Supreme Court of Illinois in the *Board of Trade v. People*, 91 Ill., 80, 83, quotes from the *City of Baltimore v. N. Y. & N. H. R. R. Co.*, 36 Conn., 255, as follows:

" 'The term "franchise" has several significations and there is some confusion in its use, but when it is used in a statute or elsewhere in the law it is generally, if not always, understood as a special privilege conferred by grant from the state or sovereign power as being something not belonging to the citizens of common right.' "

And the Supreme Court of Illinois in the case cited also said:

"No doubt the word 'franchise' is sometimes used as synonymous with privileges and immunities of a personal character; but in law its appropriate meaning is understood to be something which the citizen cannot enjoy without legislative grant."

We wish in this connection to quote one more case touching the power of one government to tax privileges or franchises or rights granted by another; that is the case of *California v. Pacific R. R. Co.*, 127 U. S., 40.

The government of the United States granted a charter to the Pacific Railroad Company, and the state of California passed a law taxing its franchises; and the Supreme Court of California held the law unconstitutional, and the State of California appealed the case to this court.

This court is unanimous in its opinion, affirming the decision of the Supreme Court of California. The opinion was delivered by Mr. Justice Bradley.

In that opinion this court said:

“Assuming, then, that the Central Pacific R. R. Co. has received the important franchises referred to by grant of the United States, the question arises whether *they are legitimate subjects of taxation by the states.* They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company situated within the state. That is a different thing, *but may it tax franchises which are the grant of the United States?* In our judgment it cannot. What is a franchise? Under the English law Blackstone defines it as ‘a royal privilege or branch of the King’s prerogative, subsisting in the hands of a subject.’ 2 Bl. Com., 37.

“Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, *a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administered, either by the gov-*

ernment directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community.

Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

“ In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a state without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice MARSHALL said in *McCulloch v. Maryland*, ‘the power to tax involves the power to destroy.’ Recollecting the fundamental principle that the constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in

McCulloch v. Maryland, 4 Wheat., 316; *Osborn v. The Bank of the United States*, 9 Wheat., 738, and *Brown v. Maryland*, 12 Wheat., 419, and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Pacific Railroad*, 9 Wall., 579, and *Railroad Co. v. Peniston*, 18 Wall., 5. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company and not upon its franchises or operations. 18 Wall., 35, 37.

“The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing powers. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.”

Applying the test according to the foregoing principles, let us look a little further into the legislation under consideration. Can the United States Government take away the privileges and rights granted by the State of Illinois, or by any other state? Can it destroy or abridge those privileges and rights so derived under the state law, or can it cripple them by onerous burdens? In other words, can it tax them? The power to tax such grant, right or privilege is the power to destroy or abridge or cripple the same, which was held in the *California* case could not be done. Can the government tax this franchise or privilege granted by the State of Illinois?

This court answered the proposition as follows in the

California case: "In our judgment, it cannot." Can this right of inheritance or this right to take by will be assumed or exercised without legislative authority? This court has answered that, it cannot be, in the *Perkins* case and in the *Magoun* case.

This court has said in the *California* case that no private person can take another's property unless the grant, right or privilege be conferred by the state government. If the general government has the power to tax this right or privilege, then, upon the basis that taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless, the general government interferes with or abridges or destroys the right to fix the laws of inheritance and to create the power to take by will, which, it is admitted, exists in the state government.

This right to inherit and to take by will is a portion of the power of the state government that confers it; to tax it is not only derogatory to the dignity, but subversive of the powers of the state government, and repugnant to its paramount sovereignty over the subject-matter of inheritance. Such is the language of this court in the *California* case.

It may be said that the general government will not abuse its discretion in regard to the taxing of an inheritance. If it has the power there is no limitation to its exercise, and as said in the *McCulloch* case by Chief Justice MARSHALL:

"The discretion to tax being conceded, the power of such government that levies the tax may destroy the subject so taxed."

If the general government has the power to levy a tax at all it has the power to levy a tax equal to the whole

amount of the legacies or distributive shares, and thus destroy the entire operation of the state law. This is unconstitutional. This will not be permitted by this court.

We ought here to refer to the case of *Scholey v. Rew*, 23 Wall., 331, hereinafter commented upon as to other points.

This court, in *Scholey v. Rew*, placed its decision upon the ground that the tax in question was similar to an income tax, and that an income tax on personal property was an indirect and not a direct tax; but this court held in the *Income Tax* cases, that a tax upon income was a direct tax when derived from invested personal property, and hence the foundation of the decision in *Scholey v. Rew* was taken away by removing the reasons upon which the decision was based in that case by the subsequent decision of this court.

There was no discussion nor decision in the *Scholey* case as to the right of the Federal government to tax a privilege created and granted by the state government.

We call attention to the fact that the *Chief Justice*, in his opinion in the *Income Tax* case, 157 U. S., 577, 578, used the following language:

“*Scholey v. Rew*, 23 Wall., 331, was the case of a succession tax which the court held to be ‘simply an excise tax or duty’ upon the devolution of an estate or the right to become beneficially entitled to the same or the income thereof, in possession or expectancy. It was like the succession tax of a state held constitutional in *Mager v. Grima*, 8 How., 490, and the distinction between the power of a state and the power of the United States to regulate the succession of property was not referred to and does not appear to have been in the mind of the court.”

From the foregoing language of this court in the *Income Tax* cases it was evident that the court felt that there was a difficulty in maintaining the *Scholey* case upon principle, and intimating that if it had been in the mind of the court that such right of inheritance was a right conferred by grant of the legislature, that the court could not have held that the general government had power to tax the same. The point in question not being discussed or decided, the *Scholey* case can not be drawn into a precedent, and we will hereafter show that the case in other particulars was decided incorrectly.

This court in its decisions, as we have heretofore shown, has never wavered upon the proposition that the national government cannot retard, impede, abridge or control the power vested in the state to legislate upon subjects reserved to the state; or to confer rights which have no existence except upon the grant of such rights and privileges by the legislature of the state; that the right of inheritance is a right or privilege which has no existence separate and distinct from the right or privilege granted by the state legislature; that it is not a common right, or a natural right, such as the right which exists in every one to his own earnings, and to the enjoyment of his own property and the increase thereof *during his life*, and which is guaranteed by the state constitution;—but is a privilege conferred by; and purely a creature of the statute and within legislative control and has no existence outside of such legislation, and the Federal government cannot interfere with the operation of such legislation.

Par. 3, Sec. 8, Art. 1, of the Constitution of the United States, provides: "The Congress shall have

power to regulate commerce with foreign nations and among the several states and with the Indian tribes."

The ninth amendment to the Constitution of the United States provides: "The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people."

The tenth amendment provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people."

Under the commerce provision of the constitution the United States licenses vessels for the coasting trade. In the case of *Harman v. Chicago*, 147 U. S., 396, it appears that the government of the United States enrolled and licensed certain tug boats named for the coasting trade. After they were so licensed by the general government the City of Chicago passed an ordinance providing:

"Sec. 1. No person or persons shall keep, use or let for hire any tug or steamboat or towboat for towing vessels or craft in the Chicago river, its branches or slips connecting therewith, without first obtaining a license therefor in the manner and way hereinafter mentioned."

The ordinance provides that each tugboat should pay a license of \$25 to the city for a period of one year.

"Sec. 4. Any individual or person violating any provisions of this ordinance shall be subject to a fine of not less than \$25 nor more than \$50 for each offense."

The question arose in that case as to the validity or constitutionality of that ordinance. The court held that the ordinance was null and void for the reason that it was in antagonism to the commerce provision of the Constitution of the United States.

Justice FIELD delivered the opinion of the court and in it said:

"In the present case a neglect or refusal of the owner of the tugs to pay the license required by the ordinance subjects him to the imposition of a fine. His only alternative is to pay the fine or the use of his tugs in their regular business will be stopped. Of course the ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce which is authorized by the United States and over which Congress has control. No state can interfere with it or put obstructions upon it without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat towing vessels or craft for hire in the Chicago river or its branches shall have a license from the City of Chicago is equivalent to declaring that such vessels shall not enjoy the privilege conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign. The other tugs are not confined to any one particular locality, but may carry on the trade for which they are licensed in any of the ports and navigable rivers of the United States. They may pass from the river and harbor of Chicago to any port on Lake Michigan or other lakes and rivers connected therewith."

In *Moran v. New Orleans*, 112 U. S., 69, 74, a law of Louisiana authorized the City of New Orleans to levy and collect a license upon all persons pursuing any trade, profession or calling and to provide for its collection, and the council of that city passed an ordinance to establish the rate of license for professions, callings and other business for the year 1880, and among others provided

that every member of a firm, or company, the agency, person or corporation owning and running tow-boats to and from the Gulf of Mexico should pay a license fee of \$5. The owner of two steam propellers, measuring over 1,000 tons, duly enrolled and licensed at the port of New Orleans, under the law of the United States, for the coasting trade, employed them as tug-boats, in taking vessels from the sea up the river to New Orleans and from that port to the sea. The City of New Orleans brought an action against him to recover the license under the ordinance, and obtained a judgment in its favor, which on appeal was affirmed by the Supreme Court of the state. Being brought to this court, the judgment was reversed with directions to the court below to dismiss the action of the city. In deciding the case, this court, speaking by Mr. Justice MATTHEWS, said of the license exacted:

“ It is a charge explicitly made as the price of the privilege of navigating the Mississippi river between New Orleans and the Gulf in the coastwise trade; as the condition on which the State of Louisiana consents that the boats of the plaintiff in error may be employed by him according to the terms of the license granted under the authority of Congress. The sole occupation sought to be subjected to the tax is that of using and enjoying the license of the United States to employ these particular vessels in the coasting trade; and the state thus seeks to *burden* with an exaction, fixed at its own pleasure, the very right to which the plaintiff in error is entitled under and which he derives from, the Constitution and laws of the United States. The Louisiana statute declares expressly that if he refuses or neglects to pay the license tax imposed upon him, for using his boats in this way, he shall not be permitted to act under, and avail himself of the license granted by the United States, but may be enjoined from so doing by judi-

cial process. The conflict between the two authorities is direct and express. What the one declares may be done without the tax, the other declares shall not be done except upon payment of the tax. In such an opposition, the only question is, which is the superior authority; and reduced to that, it furnishes its own answer."

These cases show that where the power to legislate resides in one government granted to it by the constitution, the operation of such laws cannot be defeated or rendered useless by any other power or government. In those cases the power to regulate such commerce resided in the government of the United States by the express provision of the constitution, and hence the state governments were deprived of any right to legislate. The converse of the proposition is that where a power resides in the state government to legislate upon a particular subject and is reserved to the state government by the Constitution of the United States, expressly or otherwise, the United States government cannot interfere with the operation of such laws as are passed by the states.

In the case at bar, it is not denied, and cannot be, that the state government has the power to legislate touching the subject of inheritances and wills. That power is reserved to it by the Constitution of the United States, and hence the United States cannot interfere with the operation of any constitutional law so passed by the state. The only question is, therefore, as to whether the legislation of Congress in this case does interfere with the operation of the state law. We have shown by decisions heretofore quoted that any act of one government which interferes with or retards or abridges the power of another exercised under the provisions of its own constitution,

to carry its power into operation must be null and void. We have shown that the power to tax the operation of any law is the power to destroy or abridge the operation of such law and to defeat it.

In this connection we wish also to refer to the case of *Van Brocklin v. State of Tennessee*, 117 U. S., 151, 155, in which this court, by Mr. Justice Gray, said:

“The sovereignty of a state extends to everything *which exists by its own authority* or is introduced by its permission. * * * The attempt to use the taxing power of a state on the means employed by the government of the Union in pursuance of the Constitution is itself an abuse, because it is the usurpation of a power which the people of a single state cannot give. The power to tax involves the power to destroy; *the power to destroy may defeat and render useless the power to create*; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control.”

If it be then conceded that the state government has the power to legislate upon the question of inheritances and wills, and the United States government has not, then there is a plain repugnance in conferring upon the United States Government a power to control the operation of the state law touching such subject—because this legislation relates to a subject the control of which is declared by this court to be supreme in the legislature of the state, and hence this power claimed by the United States Government to tax the operation of a state statute may destroy, defeat and render useless the power of the state to create such law. In other words, the United States has no power by taxation, or otherwise, to retard, impede, burden or in any manner control the operations of the

constitutional laws enacted by the states to carry into execution the powers vested in the state government.

III.

A DIRECT TAX.

Our next contention is that the tax in question is direct and hence subject to the rule of apportionment among the states as provided in the constitution, and this tax not being apportioned is therefore unconstitutional.

(a) The language of sections 29 and 30 of the act of June 13, 1898, under which the right of the government is asserted, plainly shows that the intention of Congress was to impose a tax *directly* upon legacies and distributive shares or upon the owners in respect thereof, and not upon the *right* to inherit the same, or to receive such legacies as a bequest.

Sec. 29 reads in part as follows:

“That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing after the passage of this act from any person possessed of such property either by will or by the intestate laws of any state or territory, * * * shall be and hereby are made subject to a duty or tax to be paid to the United States as follows, that is to say: where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

“First. Where the person or persons entitled to

any beneficial interest in such property shall be the lineal issue or lineal ancestors, brother or sister of the person who died possessed of such property aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

Sub-paragraphs 2, 3, 4 and 5 use the same language as the first, except that the rate is increased according to the relation of the parties taking, to the decedent. The court will observe that the language is that the "*legacies or distributive shares arising from personal property*" passing by will or inheritance "*shall be and hereby are made subject to a duty or tax to be paid to the United States.*"

Nothing is said about the right to take by inheritance or will being taxed, but that the legacies or distributive shares shall be taxed. The act purports to tax the *thing so taken and not the right to take it*. The first sub-paragraph reads that

"Where the person or persons entitled to any *beneficial interest in such property* shall be the lineal issue or lineal ancestors, brother or sister to the person who died possessed of *such property* as aforesaid, at the rate of seventy-five cents for each and every hundred dollars *of the clear value of such interest in such property.*"

The words "*such property*" twice used in that paragraph refer to the entire estate of the deceased and that which is to be taxed is the *beneficial interest* taken by any person by will or inheritance and not the *right to take* such beneficial interest. The proviso at the end of the fifth sub-paragraph reads:

"*That all legacies or property passing by will or by the laws of any state or territory to husband or wife of the person (who) died possessed as aforesaid, shall be exempt from tax or duty.*"

This proviso makes clear the former language. It is not the right of the husband or wife to take such legacies but the legacies and inheritances themselves that are exempt, that is, the *property itself* in which such husband or wife become interested shall be exempt.

Section 30 provides that

“Every executor, administrator or trustee before payment or distribution to the legatees or any parties entitled to *beneficial interest therein* shall pay to the collector or deputy collector of the district of which the deceased person was a resident *the amount of the duty or tax assessed upon such legacy or distributive share*, and shall also make and render to the said collector or deputy collector a schedule, list or statement in duplicate of the amount of such legacy or distributive share, *together with the amount of duty which has accrued or shall accrue thereon.*”

This language is still more explicit, and makes it certain that the Congress intended to tax the legacy or distributive share, and not the right to tax such legacy or distributive share, and is not a tax upon the succession or right of succession, but upon the property itself.

And said section 30 also provides that the schedule, list or statement above referred to “shall contain the names of each and every person entitled to any beneficial interest therein, together with the *clear value of such interest*, the duplicate of which schedule, list or statement shall be by him immediately delivered *and the tax thereon* paid to such collector.”

Section 30 also provides:

“Where the executor, administrator or trustee refuses or neglects to pay such tax or to deliver to the collector the schedule, list or statement of *such legacies, property or personal estate*, or shall deliver

to the collector a false schedule or statement of such legacies, property or personal estate, etc., or shall not truly and correctly set forth and state therein *the clear value of such beneficial interest*, or where no administration has been taken out, *the collector or deputy collector shall make out such lists and valuation as in other cases of neglect and refusal*, and shall assess the duty thereon, and the collector shall commence appropriate proceedings before any court of the United States in the name of the United States against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall *subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court*, and from *the proceeds of such sale the amount of such tax or duty*, together with all costs and expenses of every description to be allowed to such court, shall be first paid."

The same section also provides that

"the deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under or by virtue of such judgment or decree *and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act.*"

From the foregoing portions of the statute it is evident that the property itself is taxed and that a lien for the tax is created by the act upon the property. It is the legacy that is taxed and it is the legacy upon which the lien of the tax is created. No one would be bold enough to say that a lien would be created upon the right to inherit or take. Such a right cannot be taken hold of, impounded or sold by the govern-

ment. It is only the property or legacy or distributive share that is taken hold of and impounded and sold. If language is ever to have its natural meaning then surely in the construction of this act the natural common sense meaning is so explicit that there can be no escape from the conclusion that Congress intended to tax *the legacy or distributive share* and not the *right* to take and inherit the same, nor the right of devolution.

Will this court ascertain the meaning of Congress by the language used, which is plain, or will it obtain a different result by a refinement upon the language which wrests the same from its original significance?

In *Waller v. Harris*, 20 Wend., 561, the court said:

"But if the courts have sometimes gone very far towards taking the place of law-makers it is but justice to say that of late years they have been striving, both here and in England, to get back again into their appropriate sphere of action. Except in relation to a few old statutes which were long since overwhelmed by commentaries and decisions, the current of authority at the present day is *in favor of reading statutes according to the natural and most obvious import of the language without resorting to subtle and forced constructions* for the purpose of either limiting or extending their operation."

See, also, Sedgwick on Statutory Law, p. 260.

Judge COOLEY, in his work on Taxation (2d Ed., p. 266), says:

"It is thought to be only reasonable to intend that the legislature in making provision for such proceedings would take unusual care to make use of terms which would plainly express its meaning in order that ministerial officers might not be left in doubt in the exercise of unusual powers, and that the citizen might know exactly what were his duties and liabilities. A strict construction in such

cases seems reasonable, because, presumptively, the legislature has given in plain terms all the power it has intended should be exercised. It has been generally supposed that the like strict construction was reasonable in the case of tax laws."

And Judge COOLEY, in the same work, p. 268, quoting the language of Mr. Justice STORY, says:

" 'In the first place, it is, as I conceive, a general rule in the interpretation of all statutes levying taxes for duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt such statutes are construed most strongly *against the government and in favor of the subject or citizens*, because burdens are not to be imposed or presumed to be imposed beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense remedial laws or laws founded on any permanent public policy, and therefore are not to be liberally construed.' "

Then, if we measure the words used in the act in question by this common sense rule of construction, can there be any doubt that the Congress of the United States intended to tax directly the property which has already passed to the next of kin or legatees and not simply the right of devolution?

To tax the right and not the thing itself is a departure from the language used in the statute.

If this court will now recur to the case of *Pollock v. Farmers' Loan and Trust Company*, 157 U. S., and *Same v. Same*, 158 U. S., 601, it will see that the rule of construction contended for by us was there ratified, for in that case the language of Congress was:

"There shall be assessed, levied, collected and

paid annually upon the gains, profits and income received in the preceding calendar year * * *
 a tax of two per centum on the amount so derived over and above \$4,000 * * *."

The foregoing language was held by this court to impose a direct tax upon such income or the property from which it was derived, and if such language in the one instance imposes a direct tax we do not perceive why in the case at bar language almost identical does not also impose a direct tax. The language is:

"Any legacies or distributive shares arising from personal property * * * shall be and hereby are made subject to a duty or tax, etc."

This court did not there hold that the tax so created was a tax upon the right to receive and take such income, but that it purported to be a tax upon the income itself, or upon the investment from which the income was derived, and the court there held distinctly that a tax on income from real and personal property was invalid upon the ground that it was a direct tax and not apportioned among the states.

A very strenuous effort was made in that case to induce the court to hold that an income tax was an excise tax, namely, a tax upon the right to take and hold such income. The same effort will be made in this case, but after the full investigation made in that case as to the meaning of direct and indirect taxation there would seem to be little left for a discussion in this case touching that proposition considered alone in the light of the language used.

It will be claimed that *Scholey v. Rear*, 23 Wall., 331, is an adjudication that the tax in question is an indirect tax, and it will also be shown that sections 29 and 30 of

the Revenue Law of 1898 are substantially an exact copy of sections 124 and 125 of the act of 1864. See 13 Statutes at Large, 285, 286.

It will be observed, however, that the decision in *Scholey v. Rew* was upon the right to tax the devolution or succession to real estate and not upon the right to tax the devolution or succession to personal property. There was no decision upon that portion of the statute relating to personal property. Under the act of 1864 the language expressly confers upon the government *the right to tax the devolution or succession to real estate*, but no such language is used in regard to personal property, and the omission in that portion of the act of the right to tax the devolution or succession to personal property has great force in the interpretation of sections 124 and 125, the statute under construction being a substantial copy of those two sections, which relate to personal property.

We may ask why the language was changed and why Congress did not use the language which was used touching real estate. The language touching real estate is as follows:

“That there shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof, the following duties, etc;”

And in section 126 of that act is the following:

“That the term ‘succession’ shall denote the devolution of title to any real estate.”

It is evident that a taxation upon the devolution of real estate or the passing of title to real estate means something very different from a taxation upon the thing passed or upon the devise or inheritance of that which has already been passed.

The court in the *Scholey* case simply had under construction the portion of that act relating to real estate, and why Congress changed the language in treating of the taxation of legacies and distributive shares of personal property we think can be attributed to no other cause than that they intended something else with reference to personal property as contradistinguished from real estate; that Congress did not intend the tax upon the devolution or passing of personal property but upon the property itself. We think so, on account of the language used, which makes it manifest that there was a different intention, touching personal property, possessed by Congress at the time. And what was the reason of such different intention? We may not ascertain precisely, but it would seem that the former decisions of this court up to the year 1864 made it plain to Congress that real estate as such could not be taxed directly without apportionment among the states. Such was the decision in the *Hylton* case, 3 Dall., 171.

Therefore, Congress expressly intended to avoid the effect of that decision as to real estate by taxing the devolution instead of the real estate itself, but so far as personal property was concerned Congress undoubtedly construed the decision in the *Hylton* case to be that it had the right to tax the same directly without coming within the provisions of the Constitution with reference to the apportionment of such taxes among the states. It seems to us that this is the only reasonable interpretation of the difference in the language used with reference to the taxation of real estate and the taxation of personal property in the act of 1864. There could have been no

other reason. It is evident that Congress intended expressly that the taxation so far as related to real estate could be only upon the right to inherit or to take by will and not upon the real estate itself, and that the intention of Congress as to personal property was that it had the right to tax directly the personal property so taken. We think this to be a reasonable explanation of the difference in the language used in that act.

The decision in the *Scholey* case was rendered in 1874, ten years after the passage of the act by Congress. Five of the judges of this court who were upon the bench in 1874, when the *Scholey* case was decided, were also upon the bench in 1864 when the act of Congress in question was passed, so that the entire bench in 1874 must have been entirely cognizant of the reasons influencing Congress to make a distinction between the taxation of real and personal property. Although it is clear from the language of the statute in regard to real estate that the intention was to tax the devolution, the court really placed its decision upon the ground that the decisions of this court had been before that time, that a tax on income was not a direct tax; and this court by Justice CLIFFORD said, that such decisions "cannot be distinguished in principle from a succession tax such as the one involved in the present controversy."

The reasons for the decisions seem to be quite unsatisfactory, and we have already shown and will presently be able to point out how the decision in that case in other particulars cannot be sustained; but for the purpose of this point we wish simply to call the attention of the court to the fact that the decision was based expressly upon the language pertaining to real estate and that the tax was a tax upon the devolution or right of succession and not against the property after it had passed to the legatees or next of kin.

The decision has no bearing upon the language of the two sections involved in this case, because the act of 1864 respecting personal property and the act in question copied therefrom do not purport to confer the power to tax the devolution or passing of personal property, which was the sole basis of the decision in the *Scholey* case as to real estate.

There are two cases which may be referred to by counsel for the government, first the *United States v. Perkins*, 163 U. S., 625, and next *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283.

It was held in both of those cases that the tax imposed by the state laws of New York and Illinois respectively was a succession tax or a tax upon the right to inherit. In the first case, however, the New York statute expressly provided that the tax should be a succession tax or a tax upon the right to inherit.

The language is as follows (165 U. S., 626):

“A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of \$500 or over.”

The language of the Illinois statute does not in terms say that the tax shall be upon the succession, but the plain implication therefrom is that it is a tax upon the right of succession. But the construction, however, of the language adopted as to the state inheritance laws has no significance when we come to construe and apply the same to this Federal law.

It is true that the language used in some of these statutes of the states purports to levy the tax upon the legacies or inheritances, and such statutes have been construed by this court to be a tax upon the devolution or

right to inherit. That construction was given because the natural legal inference from the language used was that the charge or tax was imposed in payment for the privilege thereby granted by the state—the privilege being something which the state might grant or withhold—it being entirely within the power of the state government. It was not a *common right*, but it was a right belonging to the state, as such, to control as it chose, and hence the state could impose any burden in consideration of the privilege granted.

Mr. Justice BROWN, in the *United States v. Perkins*, said:

“While the laws of all civilized states recognize in every citizen the *absolute* right to his own earnings and to the enjoyment of his own property and the increase thereof *during his life*, except so far as the state might require him to contribute his share for public expenses, *the right to dispose of his property by will* has always been considered purely a creature of statute and within legislative control.”

It is implied upon the very face of the state statutes that the state retains so much of every estate by way of compensation for the privilege granted. To be sure it is a tax measured by the property inherited, but it is, nevertheless, a tax upon the right so granted and in compensation thereof. The plain legal effect is that it is a burden placed upon the right to inherit, *for there could be no right to tax property as such unequally*, except upon the basis of a privilege conferred, which authorizes the state to arrange into classes the persons upon whom such privilege is conferred. The tax under the state laws does not attach after the title has passed and become vested, but attaches concurrently with the grant and in consideration thereof, while the tax by the Federal statute has nothing

to do with the *passing of the title and confers no privilege not before acquired* under the state statute. There is, therefore, a basis in the nature of things for such construction of the state statutes, but as to the Federal statute now under construction, there is no basis for any meaning which is contrary to the language used, for the Federal government has no power to grant the privilege in question and therefore has no right to demand payment or compensation for such privilege. The title to the property passes without its consent, and it is the property and not the right to take it that is taxed by the Federal statute and which alone purports to be taxed thereby.

The United States government confers no privilege and therefore can demand nothing for a privilege or right not given by it—and the language used by Congress cannot be construed as an attempt to charge for a privilege not conferred by it. This statute is incapable of such construction given to the state statutes and such construction is in opposition to the letter and spirit of the Federal statute, and consequently the Federal statute must be construed according to its plain language as being an attempt to tax directly the property received by will or inheritance.

The language of a taxing statute is to be construed strictly against the government, and not liberally.

Cooley on Taxation, (2d Ed.) pp. 266, 268.

There is no ambiguity in the language of this statute, and no room for construction. A statute which should provide that *tea* should be taxed at a certain rate per pound cannot be construed so as to include *coffee* also. A statute which provides for taxation of the property in-

herited cannot be construed so as to include a tax upon the right to inherit, for it means something entirely different.

In the *Pollock* case, 157 U. S., 583, this court said:

“*If by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed would have disappeared and with it one of the bulwarks of private rights and private property.*”

If by calling a tax upon legacies or distributive shares of an intestate estate an indirect tax when the language makes it essentially direct, then this bulwark of the constitution respecting direct taxes and their apportionment among the states is surely frittered away and private rights and private property would not receive that protection by the courts which the constitution intended.

(b) Does the nature of this tax fall within the definition of an “excise, a duty or an impost,” according to the meaning of the constitution? The contention of the government is that this tax is a *duty or an excise*, and consequently an indirect tax and not to be apportioned. There is no doubt that in the constitution the words “duties, imposts and excises” are put in antithesis to “direct taxes,” and were not intended to include any direct tax but wholly and only an indirect tax. It will not do for counsel to contend that because it may be a *duty or an excise* that it ~~may~~ be levied without apportionment among the states and without *reference to the fact* whether it be direct or indirect; that is begging the question. The chief justice in the *Pollock* case, on the rehearing, 158 U. S., 622, said:

“It is said that a tax on the whole income of property is not a direct tax in the meaning of the constitution, but a duty, and as a duty leviable without apportionment whether *direct or indirect*. We do not think so. *Direct taxation was not restricted in one breath and the restriction blown to the winds in another.*”

Hence it follows that under the constitution only such “duties, excises and imposts” as are indirect may be levied without apportionment.

It is a *misnomer* to call that a *duty*, an *excise* or an *impost* which is a *direct* tax, for a duty, an excise or an impost are such *because they are indirect*, and because the burden can be shifted from the person who originally pays the same upon another.

The test fixed by the constitution is whether the tax is direct or indirect, and if direct, then, although such tax might fall under the definition of an excise, which we deem impossible, still it could not be levied except by apportionment among the states. The general definition of a duty or an excise or an impost given not only in the works of political economists but in the decisions of the courts also, is the following:

“All taxes paid primarily by persons who can shift the burden upon someone else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or the income yielded by said estates, and the payment of which cannot be avoided, are direct taxes.”

This definition is supported by the following:

Attorney General v. Reed, L. R. 10 Appeal Cases (Privy Council), 141.

Bank of Toronto v. Lambe, L. R. 12 Appeal Cases (Privy Council), 575-581.

Pollock v. Farmers Loan & Trust Company, 157 U. S., 558.

Same v. Same, 158 U. S., 631.

Principles of Political Economy, by John Stuart Mill (Edition by Laughlin), 550-562.

36 *Federalist* (Edition by John C. Hamilton), p. 275.

In the British North America Act, passed by the English Parliament, it was provided that the general government of Canada should have exclusive power of indirect taxation, and that the provinces could only levy a direct tax for provincial purposes.

Atty. Genl. v. Queens Ins. Co., L. R. 3 App. Cases, Privy Council (pt. 2), p. 1090.

The provincial legislature of Quebec levied a stamp duty of 10 cents on every exhibit produced in court in every action pending therein, and the question arose as to its invalidity or unconstitutionality under the act of Parliament. The question came before the Privy Council. (See *Attorney General v. Reed*, L. R. 10 Appeal Cases (Privy Council, 141.) It was very fully discussed in the opinion by the EARL OF SELBORNE, Lord Chancellor, in the course of which he said:

“What is the meaning of the words ‘direct taxation’? Now, it seems to their Lordships that those words must be understood with some reference to the common understanding of them which prevailed among those who had treated more or less scientifically such subjects before the act was passed. Among those writers we find some divergence of view. The view of Mill, and those who agree with him, is less

unfavorable to the appellant's arguments than the other view, that of Mr. McCulloch and M. Littré. It is, that you are to look to the *ultimate incidence* of the taxation as compared with the moment of time at which it is to be paid; that a direct tax is—in the words which are quoted here from Mr. Mill's book on political economy—'one which is demanded from the very persons who it is intended or desired should pay it.' And then the converse definition of indirect taxes is, 'those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another.' ”

The court then discusses the facts of the case with reference to the definitions above given, and finally says :

“The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases, but the best general rule is to look to the time of payment, and *if at the time the ultimate incidence is uncertain* then, as it appears to their Lordships, it cannot in this view be called direct taxation within the meaning of the second section of the ninety-second clause of the act in question. Still less can it be called so if the other view, that of Mr. McCulloch, is correct.”

In the case of the *Bank of Toronto v. Lambe*, L. R. 12 Appeal Cases (Privy Council), 575-581, another case of direct or indirect taxation arose in connection with the construction of the British North America Act. This case was also heard in the Privy Council and the opinion was delivered by Lord Hobhouse. In that case the Province of Quebec imposed certain taxes upon banking institutions doing business in that province. The point was raised that the tax attempted to be levied was not a direct tax but an indirect tax, and hence not within the power of the provincial legislature to levy.

The court said:

“These appeals raise one of the many difficult questions which have come up for judicial decision under the provisions of the British North America Act, 1867, which apportions legislative powers between the parliament of the Dominion and the legislatures of the provinces. It is undoubtedly a case of great constitutional importance. * * * In the case of banks the tax imposed is a sum varying with the paid-up capital, and an additional sum for each office or place of business. * * *

“First, is the tax a direct tax? For the argument of this question the opinions of a great many writers on political economy have been cited, and it is quite proper, or rather necessary, to have careful regard to such opinions, as has been said in previous cases before this board. But it must not be forgotten that the question is a legal one, viz., what the words mean, as used in this statute; whereas the economists are always seeking to trace the effect of taxation throughout the community, and are apt to use the words ‘direct’ and ‘indirect’ according as they find that the burden of the tax abides more or less with the person who first pays it. * * * Probably it is true of every indirect tax that some persons are both the first and the final payers of it; and of every direct tax that it affects persons other than the first payers; and the excellence of an economist’s definition will be measured by the accuracy with which it contemplates and embraces every incident of the thing defined. But that very excellence impairs its value for the purposes of the lawyer. The legislature cannot possibly have meant to give a power of taxation valid or invalid according to its actual results in particular cases. It must have contemplated some tangible dividing line referable to and ascertainable by the general tendencies of the tax and the common understanding of men as to those tendencies.

“And after some consideration Mr. Kerr chose the definition of John Stuart Mill as the one he would prefer to abide by. That definition is as follows:

“ ‘ Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; such are the excise or customs.’ ”

“ ‘ The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.’ ”

“ It is said that Mill adds a term—that to be strictly direct a tax must be general; and this condition was much pressed at the bar. Their lordships have not thought it necessary to examine Mill’s works for the purpose of ascertaining precisely what he does say on this point; nor would they presume to say whether for economical purposes such a condition is sound or unsound; but they have no hesitation in rejecting it for legal purposes. It would deny the character of a direct tax to the income tax of this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the legislature.

“ Their lordships then take Mill’s definition above quoted as a fair basis for testing the character of the tax in question, not only because it is chosen by the appellant’s counsel, not only because it is that of an eminent writer, nor with the intention that it should be considered a binding legal definition, but because it seems to them to embody with sufficient accuracy for this purpose an understanding of the most obvious indicia of direct and indirect taxation, which is a common understanding, and is likely to have been present to the minds of those who passed the federation act.

“ Now whether the probabilities of the case or the

frame of the Quebec act are considered, it appears to their lordships that the Quebec legislature must have intended and desired that the very corporations from whom the tax is demanded should *pay and finally bear it*. It is carefully designed for that purpose. It is not like a customs duty which enters at once into the price of the taxed commodity. There the tax is demanded of the importer, while nobody expects or intends that he shall finally bear it. All scientific economists teach that it is paid, and scientific financiers intend that it shall be paid by the consumer; and even those who do not accept the conclusions of the economists maintain that it is paid, and intended it to be paid, by the foreign producer. Nobody thinks that it is, or intends that it shall be, paid by the importer from whom it is demanded. But the tax now in question is demanded directly of the bank apparently for the reasonable purpose of getting contributions for provincial business. It is not a tax on any commodity which the bank deals in and can sell at enhanced price to its customers. It is not a tax on its profits nor on its several transactions. It is a direct lump sum, to be assessed by simple reference to its paid-up capital and its places of business. It may possibly happen that in the intricacies of mercantile dealings the bank may find a way to recoup itself out of the pockets of its Quebec customers. But the way must be an obscure and circuitous one, the amount of recoupment cannot bear any direct relation to the amount of tax paid, and if the bank does manage it, the result will not improbably disappoint the intention and desire of the Quebec government. For these reasons their Lordships hold the tax to be direct taxation within clause 2 of section 92 of the Federation Act."

The two cases above cited are referred to in the opinion of the chief justice in the *Income Tax Cases*, 158 U. S., 631, with approval.

The definition of an indirect tax and the quotation

made in the above opinion from Mill will be found in Laughlin's Edition of Mill's Principles of Political Economy, p. 550. This statement by Mill seems to be the most accurate that we have seen, and it runs throughout the decisions in the Income Tax cases.

This court, by Chief Justice FULLER, in the Pollock case, p. 558, said:

“Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or the income yielded by such estate, and the payment of which cannot be avoided, are direct taxes.”

It appears evident upon examination of the opinion in that case, both in the 157 U. S. and in the 158 U. S., that this court adopted the definition above given and as laid down by John Stuart Mill in his work on Political Economy, as did also the judges of the Privy Council in their interpretation of the British North America Act, 1867, which is similar in its language to the Constitution of the United States. The Chief Justice in his first opinion refers to the language used in the debate in the House of Representatives in 1794, as follows:

“Mr. Dexter observed that his colleague ‘had stated the meaning of direct taxes to be a capitation tax, or a general tax on all the taxable property of the citizen; and that a gentleman from Virginia (Mr. Nicholas) thought the meaning was that all taxes are direct which are paid by the citizen without being recompensed by the consumer; but that, where the tax was only advanced and repaid by the consumer, the tax was indirect. He thought that both opinions were just, and not inconsistent, though the gentlemen had differed about them. He thought that a general tax on all taxable property was a di-

rect tax, because it was paid without being recompensed by the consumer.' Annals 3rd Congress, 644, 646. At a subsequent day of the debate Mr. Madison objected to the tax on carriages as 'an unconstitutional tax,' but Fisher Ames declared that he had satisfied himself that it was not a direct tax, as 'the duty falls not on the possession, but on the use.' Annals, 730."

It cannot be denied, therefore, that the opinion of this court in regard to the definition of direct and indirect taxes is that laid down by Mr. Mill and other political philosophers.

Mr. Whitney, the assistant attorney general, in his discussion of the *Pollock* case, 157 U. S., 471, said:

"By general consensus of the economists of the present century, a direct (indirect) tax is a tax which can be shifted by the taxpayer onto the shoulders of some other person, as upon a buyer, mortgagor, or tenant."

In the course of the argument of Mr. Edmunds in the same case, while discussing the distinction between direct and indirect taxes, he was interrupted by Mr. Justice BROWN, 457, 461, as follows:

"Mr. Justice Brown: *Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?*"

Mr. Justice BROWN, in his dissenting opinion in that case, did not repudiate the true definition laid down by himself during the first argument, for he says in the opening of his opinion, 158 U. S., 686:

"If the question what is and what is not a direct tax were now, for the first time, presented, I should entertain a grave doubt whether, in view of the definitions of a direct tax given by the courts

and writers upon political economy, during the present century, it ought not to be held to apply not only to an income tax, but to every tax, the burden of which is borne, both immediately and ultimately, by the person paying it."

Mr. CHOATE, in the course of his argument upon the first hearing, 157 U. S., 541, said:

"A tax on personalty has all the elements of a direct tax exactly as a tax upon real estate. It is directly imposed; it is presently paid; it is ultimately borne by the party owing it. There is no choice for him to escape from the tax *but to run away*. There is no volition about it, as there is in the case of any consumable commodities upon which excises are laid. Suppose a *direct* tax be levied upon real and personal property in the states, could a man whose personal property was touched by it, appeal to the court with any hope of success and say, 'that tax on my personal property is not a direct tax, but is an excise or a duty or impost. I will pay on my real property, but I will not pay and I shall appeal to the Supreme Court to free me from paying the portion of the tax that rests upon my personal property.' The court certainly would overrule such a contention. I say there is not the least distinction between such a case and that presented here."

This court, in that case, did come to the very conclusion which Mr. Choate, in his argument, indicated, and they adopted the definition of a direct tax urged by Mr. Choate.

It was held in the *Hylton* case and strenuously argued in the *Income Tax* cases that, while the meaning of the terms "direct and indirect taxes," as ordinarily used, is as above set forth, yet the term "direct tax" as used in our constitution, has a special and more restricted meaning, applying only to capitation taxes and taxes on land.

In the *Income Tax* case the Chief Justice devotes ten

pages of the opinion (157 U. S., 558 to 568) to showing that there is nothing in the history of the debates preceding the adoption of the constitution which warrants the statement that the term "direct tax" was used in the constitution with any such narrow and restricted meaning.

He concludes his historical references with these words (p. 568):

"From these references, and they might be extended indefinitely, it is clear that the rule to govern each of the great classes into which taxes were divided, was prescribed in favor of the commonly accepted distinction between them and of the taxes directly levied under the systems of the states. And that the difference between direct and indirect taxation was fully appreciated, is supported by the congressional debates after the government was organized."

In other words, as a matter of historical fact, the term "direct tax," as it appears in the constitution, was used in the ordinary and obvious meaning which the term naturally conveys and with reference to the commonly accepted distinction between them and indirect taxes.

That this is the proper method of construing the Federal constitution appears from the following decisions:

Chief Justice MARSHALL said, in *Gibbons v. Ogden*, 9 Wh., 1:

"As men whose intentions require no concealment generally embody the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed the Constitution and the people who adopted it must be understood to have embodied words in their natural sense and to have intended what they said."

And in *Rhode Island v. Massachusetts*, 12 Peters, 721, the Supreme Court of the United States said:

“The solution of this question must necessarily depend upon the words of the Constitution. The meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions of the people of and in the several states, together with a reference to such sources of judicial information as are resorted to by all courts in construing statutes, and to which this court has already resorted in construing the Constitution.”

This court, in *Martin v. Hunter's Lessee*, 1 Wh., 326, by Mr. Justice STORY, said:

“On the other hand, this instrument (the Constitution), like every other grant, is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms, it is not to be restrained to particular cases, unless the construction grows out of the context expressly, or by necessary implication. *The words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.*”

It is a remarkable fact that between the year 1796, the year when the *Hylton* case was decided, and the year 1894, when the *Income Tax cases* were decided—in round numbers a hundred years—no definition was given by this court of a direct or indirect tax. Indeed, no definition was given in the *Hylton* case, but only instances were referred to when the tax would be direct or indirect, without any effort to tell why direct or why indirect. So in the cases following the *Hylton* case up to the *Income Tax cases*, no attempt was made to give a definition or to lay down a test for determining which class the tax fell into. This court called them direct taxes or excise taxes, but gave no reason why, the one or the other.

It seems now to be very clear that the definition given by Mill, and followed by the English courts and by this

court in the Income Tax cases, is not only scientific but accurate, viz: that is, a direct tax where the payment cannot be avoided or shifted, and that indirect tax when the burden can be shifted upon another by the person paying same, and when the intent of the law-making power was that it should be so shifted.

In the light of these definitions and decisions let us consider the nature of the act of Congress in question.

Whether the language imposes the tax upon the legacies or distributive shares as property, or whether it imposes such tax upon the right or privilege of taking by inheritance or will—the act of devolution to be measured by the amount or value of such legacies or distributive shares—in no manner changes the character of the tax if the result in either case be a direct tax upon the owner in respect to such legacies or distributive shares or in respect to such privilege or right of devolution.

If it be a privilege owned by anyone that is taxed it renders the same no less a direct tax in case the burden cannot be shifted upon some other person, and in case the law demands it of the owner and he is under a legal obligation to pay the same and cannot avoid such payment, either primarily or ultimately.

Is this a tax which is demanded of the legatee or next of kin “in the expectation and intention that he shall indemnify himself at the expense of another?”

This act of Congress makes this tax a legal demand or obligation against the legatee or next of kin, and it makes the same a *lien*, not only upon the property so taxed belonging to him, but also makes it a *lien* upon his real estate derived from the testator, and he cannot escape the obligation or throw it upon some other person; he can-

not abandon the property "or run away" as Mr. Choate puts it in his argument in the Income Tax cases, and thus discharge his liability.

Section 30 reads as follows:

"That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years or until the same shall within that period be fully paid to and discharged by the United States and every executor, administrator or trustee, before payment and distribution *to the legatees or any parties* entitled to the beneficial interest therein, shall pay to the collector, or deputy collector * * * the amount of the duty or tax assessed upon such legacy or distributive share."

If the executor, administrator or trustee pay the tax he shall be "credited and allowed such payment before every tribunal and a decree or judgment may be obtained in any United States court and a sale of such property be made."

The legal obligation against such legatee or next of kin is complete and he cannot escape from it. The title is cast upon him by operation of law subject to all liens, and it is not voluntary with him to take or not take the same, but the obligation to pay attaches to him concurrently with the passing of the title. He cannot so use or dispose of the estate or privilege as to relieve himself or shift the burden. It is not possible to think of this tax as being indirect under any conceivable state of affairs. It cannot be indirect unless the circumstances show that the person who is ultimately to pay the tax cannot be ascertained. In the case at bar the legatee pays the tax both immediately and ultimately. It was not the intention of Congress that any other person than the legatee or distributee should ever pay such tax. It was not the

desire or expectation of Congress that any other person should ever pay the same. This tax cannot be indirect in its operation. The exact distinction betwixt a direct and an indirect tax always depends upon whether *the operation of such tax be direct or indirect.*

The court cannot force a definition by calling this tax an excise or duty, for that is assuming the thing to be proven—but assuming that it is an excise or duty in no manner proves that it is an indirect tax. We must not juggle with names but must look at the substance of things and not the form. As Mr. Chief Justice FULLER said in the Income Tax cases, 157 U. S., 581:

“If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution or of the rule of taxation and representation so carefully recognized and guarded in favor of the citizens of each state, but constitutional privileges cannot be thus evaded. It is the substance and not the form which controls.”

To adopt any such principle of construction, any law, however manifestly unconstitutional, can be upheld. Lord Chancellor SELBORNE (Sir Roundell Palmer) said, *supra*: “The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases, but the best general rule is to look to the time of payment and *if at the time the ultimate incidence is uncertain*” then it is indirect; otherwise direct.

Is there, in the case at bar, any possibility of doubt as to the ultimate incidence at the time of payment? Does it not fall at such time upon and only upon the legatee or distributee?

The test under the constitution is whether it is a direct tax, not whether it may be in the nature of an excise or

duty. (Who knows exactly the definition of an excise or duty?) The constitution provides that all direct taxes shall be apportioned among the several states. (Art. 1, Sec. 2, Par. 3; also Art. 1, Sec. 9, Par. 4, Const. U. S.')

Whether it be a duty or excise, or in the nature of a duty or excise, is of no consequence, if it also be a *direct* tax it must be apportioned.

The definition of a duty or excise may not be easily expressed, but the definition of a direct tax, *when applied to the language of this act*, is simple and easy. The burden in this case cannot be shifted. It falls immediately and ultimately upon the legatee or distributee. It was the intention and expectation of Congress in the present case that it should fall upon and be paid by the legatee or distributee. To avoid the provision of the Constitution the court is not permitted to call it an excise or duty, for in calling it so we do not escape the fact that it is direct in its character.

This court expressly decided this point in the Income Tax cases, 158 U. S., 622, where Mr. Chief Justice FULLER said:

"It is said that a tax on the whole income of property is not a direct tax in the meaning of the Constitution, but a duty, and as a duty leviable without apportionment, whether *direct or indirect*. We do not think so. Direct taxation was not restricted in one breath and the restriction blown to the winds in another."

So we gain nothing in this case by discussing the definition of duty or excise or impost, for if it be a duty or excise or impost it must still be apportioned in case it be direct in its operation. The chief justice further said (p. 627):

"The Constitution prohibits any direct tax un-

less in proportion to numbers as ascertained by the census; and in the light of the circumstances to which we have referred is it not an evasion of that prohibition to hold that a general unapportioned tax, imposed upon all property owners as a body, for or in respect of their property, is not direct in the meaning of the Constitution because confined to the income therefrom?

“Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitution, taken in its plain and obvious sense and with due regard to the circumstances attending the formation of the government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and *with no possible means of escape from payment*, so belonging to a totally different class from that which includes the property from whence the income proceeds?”

Nor can a distinction be taken between a tax upon tangible and intangible property, between a thing in possession and a thing or chose in action. A duty or excise may be levied upon tangible property, such as imported goods and manufactured articles, such as beer and whiskey—and a direct tax may be levied upon rights or choses in action, such as investments of income in securities. (158 U. S., 635.)

A franchise, a license, a privilege, a right to do business, all constitute property of which a party cannot be deprived except by due process of law. The privilege of inheritance is property, and as such taxable within the limitations of the Constitution. But whether a tax so levied upon such rights and privileges is direct or indirect does not depend upon the character of the property taxed, but upon the ultimate incidence of the tax. It depends upon whether the burden can be shifted upon

another or must be paid both immediately and ultimately by the party charged therewith, and by the party who Congress intended and expected should bear the same.

It must be admitted that there is some confusion in the cases decided by this court, and in some of them there are expressions difficult of explanation, but we think they all arise from a somewhat negligent following of this early decision in *Hylton v. United States*, 3 Dall., 171.

It is not clear that this court in the Income Tax cases intended to overrule that decision in all its parts. It is certain, however, that this court did overrule the conclusions drawn from that case, and indulged in by counsel and also by this court in some of the cases as to the right to tax personal property without apportionment. If any portion of the decision in that case remains unchallenged by the decision in the Income Tax cases it is that portion only which permits the taxation of the use and expense of such property, the payment of which is capable of being shifted upon some other person, as, for instance, carriages owned for hire. The expense of such carriage and the tax thereon might be shifted upon the person hiring the same, so, it being possible that all persons owning carriages would use them for hire, the taxation of such use would be an excise and the amount of such tax could be shifted upon the person hiring the same. But where it would not be possible under any circumstances to shift such tax upon another, as in the case at bar, it would be a direct and not an indirect tax, nor would it be an excise.

In the *Hylton* case it might be considered from the nature of the article taxed, namely, a vehicle for transportation for hire, that it was a tax upon the use of it. In

other words, the tax upon the carriage was considered a tax upon its consumption or use. If it had been considered in that case that the tax should abide with the person who paid it, it would not have been considered as an indirect tax, but as the owner thereof had the power to shift such tax upon the hirer or person using the carriage, it was considered indirect. The language of the justices deciding the *Hylton* case is certainly remarkable in its uncertainty of meaning, and this court in the Income Tax cases never intended to affirm the decision in that case, *but by implication overruled the same and distinctly held that a tax levied upon personal property as such and that could not be shifted upon another was a direct tax.*

The chief justice reviews very carefully the *Hylton* case, 168 U. S., 623 to 628, and the views of Mr. Hamilton as expressed in the *Federalist* and in his argument in the *Hylton* case and the views of the various judges.

The chief justice quotes from the 36th *Federalist*, written by Mr. Hamilton, as follows:

“The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of *direct and indirect* kind.
* * * As to the latter, by which must be understood duties, and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended.”

Whether the explanation given by the chief justice as to the meaning of the *Hylton* case was satisfactory or not, the court did hold that a tax levied upon personal property as such, and which could not be shifted upon another, was a direct tax.

This is the language used in the 158 U. S., 628:

“Nor can we perceive any ground why the same

reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom. All the real estate of the country and *all its invested personal property* are open to the direct operation of the taxing power if an apportionment be made according to the constitution. The constitution does not say that no direct taxes shall be laid by apportionment on any other property than land; on the contrary, it forbids all unapportioned direct taxes; and we know of no warrant for excepting personal property from the exercise of the power or any reason why an apportioned direct tax cannot be laid and assessed as Mr. Gallatin said in his report when Secretary of the Treasury in 1812, 'upon the same objects of taxation on which the direct taxes levied under the authority of the state are laid and assessed.' "

The views of this court, as expressed in the *Income Tax* cases, upon this subject, are not uncertain, although the court was not unanimous; but the court as such recognizes that a direct tax may be laid upon anything called personal property, be it tangible or intangible, be it in possession or in action, which proposition is in direct contravention of the decision in the *Hylton* case, and hence the authority of the *Hylton* case has ceased to be controlling. It must, therefore, be considered that this court is committed to the definition that those only are indirect taxes which may be shifted upon another and which Congress both intends and expects to be so shifted, and those are direct taxes which are "imposed merely because of ownership and with no possible means of escape from payment"—158 U. S., 625, 628, and the cases heretofore cited. And hence the decision of the *Hylton* case is either overruled or is so modified as to conform to the definitions above given.

The tax so imposed by this act falls clearly within the

definitions above given, and if there be any remaining dispute as to what, under all circumstances, constitutes a direct or an indirect tax, the facts in this case necessarily exclude any dispute, inasmuch as it clearly falls within any definition known or given, either by economists or courts, as to the meaning of a direct tax. Having now reviewed and ascertained the true definition of direct and indirect taxes so far as a definition can be given, let us now refer to the decisions subsequent to the *Hylton* case, and prior to the decision of the *Poillock* case, all of which are more or less based thereon.

The case of *Pacific Insurance Co. v. Soule*, 7 Wall., 433, arose under the Internal Revenue Act of 1861, wherein a certain tax was levied upon amounts insured, renewed or continued by insurance companies, based upon the gross amount of premiums received and assessments made therefor, and a tax also upon dividends, undistributed sums and income. The question arose as to the constitutionality of that statute, such tax not being apportioned among the states. It was contended on behalf of the insurance company that it was a direct tax, and on behalf of the government that it was an indirect tax, and the *Hylton* case was referred to by the government's counsel as decisive of the question. Justice SWAYNE delivered the opinion and quoted from the opinions of the justices in the *Hylton* case.

The court, after stating the case, said:

“ If a tax upon carriages kept for his own use by the owner is not a direct tax, we can see no ground upon which a tax on the business of an insurance company can be held to belong to that class of revenue charges.”

The foregoing is substantially the entire argument of the court. The argument *ab inconvenienti* is also

referred to, which does not seem to add anything to the strength of the argument, excepting that a direct tax would rarely, if ever, be levied at the present day upon personal property. That is a political argument with which this court has nothing to do. Notwithstanding the decision in that case is based entirely upon the authority of *Hylton v. United States*, there is in our mind a much better reason in support thereof, viz., that the tax is indirect for the reason that the burden thereof can be shifted by the insurance company upon the persons whom they insure, just as a stamp duty required to be paid by a person conveying real estate can be shifted upon the purchaser, and just as the tax for a license or upon an authority to do business may be shifted upon the customers of the parties.

It is not the question whether it may be wholly shifted, but in the nature of things a large part and probably the whole amount of the cost of such tax could be shifted upon the persons voluntarily dealing with such insurance company, and hence that tax clearly falls under the definition of an indirect tax, viz., where the person upon whom it is levied may recover the amount by means of advance in premiums for such insurance. In other words, it is an indirect tax in that case because it is demanded from one person, viz., the insurance company, in the expectation and intention that such company shall indemnify itself at the expense of the insured. Such a tax is clearly an excise and indirect tax, not upon the basis of the decision in the *Hylton* case as was determined by the court, but on account of the nature of the tax itself being indirect, and because it cannot be made to rest immediately and ultimately upon the person taxed any more than a tax upon beer manufactured can be made to rest

upon the brewer ultimately, as he may shift the same by adding the amount of the tax to the cost of manufacture, just as the insurance company can shift the tax by adding the amount of the same to the cost of insurance, and the person who deals with such insurance company voluntarily, therefore, pays the tax.

It must be so in the nature of things, because the insurance company, prior to the levy of such a tax, would fix its rates corresponding with such fact, and would not do business unless such rates were satisfactory. It would at once, in consequence of such a tax, raise the premium for the insurance, and thus force its payment indirectly by another person. It is added to the cost of the goods and the goods are then sold to the consumer, who buys the same voluntarily at such increased cost. The argument runs straight through, and in every instance where the tax can be shifted upon some other person, it is an indirect tax; and the *Soule* case was therefore properly decided, but an improper reason given for it.

In *Veazie Bank v. Fenno*, 8 Wall., 533, there was decided the constitutionality of an act of Congress passed July 13, 1866, which provides that every national banking association, state bank or banking association shall pay a tax of ten per centum on the amount of the notes of any state bank or state banking association paid out by them after August 1, 1866.

The *Veazie Bank of Maine* contended that such tax was a direct tax and, not being apportioned among the states, was unconstitutional. The case was argued by the Attorney General of the United States, relying upon the case of *Hylton v. United States*, 3 Dall., 171, and *Pacific Insurance Company v. Soule*, 7 Wall., 433.

Chief Justice CHASE delivered the opinion, and after setting out the history of the legislation of Congress touching the national currency, and also touching the subject of direct taxation, he said:

“ This review shows that *personal property*, contracts, occupations and the like have never been regarded by Congress as proper subjects of direct tax.
* * * It may be rightly affirmed, therefore, that in the practical construction of the constitution by Congress, *direct taxes have been limited to taxes on land and appurtenances and taxes on polls or capitation taxes.* ”

Then after discussing the views of Madison, King and others, he says:

“ All this doubtless shows uncertainty as to the true meaning of the term ‘direct taxes;’ but it indicates also an understanding that direct taxes were such as may be levied by capitation and on lands and appurtenances. ”

The chief justice then refers to the case of *Hylton v. United States*, and reviews the language of the justices, and then proceeds:

“ And it may further be taken as established upon the testimony of Paterson that the words ‘direct taxes’ as used in the constitution comprehended only capitation taxes and taxes on land and perhaps taxes on personal property by general valuation and assessment of the various descriptions of property within the several states. It follows necessarily that the power to tax without apportionment extends to all other objects. ”

The chief justice also quotes the case of *Pacific Insurance Company v. Soule*, which had been decided the previous year, adding so much force to the *Hylton* case.

The court then refers to the proposition that it was an attempt upon the part of the government to tax agencies

of the state government. Touching that proposition the chief justice said:

“ But in the case before us the object of taxation is not the franchise of the bank but the property created or contract made and issued under the franchise or power to issue bank bills. A railroad company in the exercise of its corporate franchises issues freight receipts, bills of lading and passenger tickets, and it cannot be doubted that the organization of a railroad is quite as important to the state as the organization of a bank, but it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the state which granted the charter to the railroad, and it seems difficult to distinguish the *taxation of notes issued for circulation from the taxation of these railroad contracts*. Both descriptions of contracts are means of benefit to the corporation which issue them; and both, as we think, may properly be made contributory to the public revenue.”

It will be observed from the foregoing that the court did not attempt to state why a tax upon freight receipts, bills of lading or notes issued by a bank was indirect and not direct. The court only states it as a fact, but the reason why such taxation is indirect has heretofore been reviewed by us, and that reason is that such taxes are those which are demanded from one person or corporation in the expectation and intention that he shall indemnify himself at the expense of another.

The railway company or express company shifts or may shift the burden of the tax imposed upon the bill of lading or express receipt, by charging the person for whom it carries the article so much additional for the service. In that respect it is like a duty on foreign merchandise or a stamp upon a deed. It is added to the cost or price, and the person buying the merchandise or the real estate need

not purchase—it is voluntary with him—but if he does purchase he thereby pays the tax and it is so shifted upon him, just as we have heretofore explained in the case of the *Insurance Company v. Soule*.

The same can also be said in regard to the issue by a state bank of its notes, which the court in the last case refers to as being similar to the issue by a railway of its freight receipts or bills of lading.

The bank loans its notes or currency to a customer and takes back the obligation of the borrower at a certain rate of interest. In doing so it has the power to include the tax and add it to the interest. To be sure the tax in question was such that it practically destroyed the loaning by the bank of its notes to customers, because the tax was so great that no customer would pay the same and therefore it destroyed the currency of such bank of issue. Such probably was the intention of Congress, but the operation would be the same in case the bank had been able to loan its notes to anyone. It would have managed to recover the tax from the person borrowing. If it had been a reasonable tax of a half or one cent, it might not have destroyed the use of such state bank currency, just as the tax upon the national banks upon the currency issued by them is taxed at a small rate but not sufficient to destroy the use of such bank currency by the banks, although in point of fact it is known that many banks issue as little currency as possible on account of its unprofitableness resulting by reason of the government tax thereon. Nevertheless, wherever the national banks to-day issue their currency and pay the tax to the government, there is no doubt that the bank is enabled to shift the tax upon the persons dealing with it, and hence it cannot be said that the bank pays the tax

ultimately. Had the court in that case stated the reasons why the tax was indirect, instead of relying upon the *Hylton* case and *Soule* case, the decision would have been much more satisfactory. The judgment of the court, however, is undoubtedly correct that the tax is constitutional, but not for the reasons, in our judgment, stated in the *Hylton* case or even in the *Soule* case.

But upon reading the opinion of the *Veazie Bank* case it is clear that the court was not satisfied with the decision based upon the grounds already mentioned, but went on to state that under the constitution the power to provide a circulation of coin and the emission of bills of credit is given to Congress, and the court proceed to say

“That there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description and convenient and useful for circulation. * * * Having thus in the exercise of undisputed constitutional powers undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. * * * To this end Congress may restrain by suitable enactment the circulation as money of any notes not issued under its own authority. Without this power indeed its attempts to secure a sound and uniform currency for the country must be futile.”

So the court practically placed its decision upon another provision of the constitution, viz., the power to coin money and regulate the value thereof.

Art. 1, Sec. 8, Par. 5.

What the chief justice said in that case, however,

that no tax upon personal property could be direct, based upon the *Hylton* case, is overruled by the *Income Tax* cases. It being agreed, therefore, that a direct tax may be levied upon personal property, and when so levied must be apportioned among the states, the only thing to which a court is to look is to the character of the tax, whether it was intended to be direct or indirect, and if intended to be paid by the person against whom it was levied primarily and ultimately, without ability to shift the same upon another, then such tax is direct. This is the test, and not the question whether it be personal property or real property upon which the tax is levied.

The case of *National Bank v. United States*, 101 U. S., 1, is a decision upon the same provision of the act of 1866, levying a tax of 10 per centum upon all state bank issues, and the court confines itself simply to referring to the decision in *Veazie Bank v. Fenno*, and says "we think this case comes directly within the principles settled" in that case. But this court in that case, by Chief Justice WAITE, quotes from the decision in the *Veazie Bank* case only that portion relating to the power of the Congress to coin money and fix the value thereof, and says "that ground is a satisfactory one," and further says:

"As against the United States a state municipality has no right to put its notes into circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, *i. e.*, made use of as a circulating medium. Such a use is against the policy of the United States."

It will be observed in that case the court does not refer to the *Hylton* case as the basis of its decision, nor to the *Soule* case, but solely to that portion of the decision

in the *Veazie Bank* case with respect to the powers of Congress under that provision of the constitution relating to the coining of money and fixing the value thereof, and hence has no bearing whatever upon the decision of the question at bar, because it does not place the decision upon the ground that it is either a direct or an indirect tax.

In the case of the *Railroad Company v. Collector*, 100 U. S., 595, a question was raised as to the constitutionality of the law levying a tax upon corporations upon the interest paid by it upon its bonds.

Mr. Justice MILLER, in delivering the opinion, said:

“As the sum involved in this suit is small, and the law under which the tax in question was collected has long since been repealed, the case is of little consequence as regards any principle involved in it as a rule of future action.”

It is clear, therefore, that the court did not desire that what it said touching the facts of that case should be drawn into a precedent thereafter.

The court said:

“That the manifest purpose of the law was to levy the tax upon the net earnings of such companies (railway companies),”

and that the easiest way to ascertain such earnings was by reference to the dividends declared or the interest paid on its funded debt, or carried to a reserve or other fund remaining in its hands.

The court also said:

“Looking to these modes of distribution as the surest evidence of the earnings which Congress intended to tax, it was less liable to evasion than any other. The tax was imposed upon all of them.
* * * The tax was not laid on the bondholder who received the interest, but on the earnings of the corporation which paid the interest.”

The court does not refer to a single case nor give its reasons for considering it an indirect tax, but it is clear from what has hitherto been said touching the *Soule* case that such tax can be shifted upon the persons doing business with the railroad, and if a certain amount of earnings are necessary to enable a corporation to do business, then it must be presumed that, as in the case of a stamp upon a bill of lading, the tax so levied, while collected primarily from the corporation, is collected ultimately from the person doing business with the corporation which creates the earnings, and that such a tax was levied upon the earnings of railways by Congress in the expectation and with the intention that the corporation should indemnify itself at the expense of the person dealing with it.

It was simply another way of collecting taxes from the body of the community, just as the imposition of a duty upon foreign goods is added to the cost of the goods, and is ultimately paid by the consumer, or by the person purchasing the goods, and in the case of a railway by the person hiring the railway to transport its goods. That it is an indirect tax is perfectly obvious, and consequently the court's decision was correct.

The case of *Springer v. United States*, 112 U. S., 586, has been so fully reviewed by this court in the *Income Tax* cases, 157 U. S., 578, that we need not refer to it further than to say that the opinion thus concludes:

“Our conclusions are that *direct taxes* within the meaning of the Constitution are only capitation taxes as expressed in that instrument and taxes on real estate; and that the tax of which the plaintiff in error complains is within the category of an excise or duty.”

It is plain that this court in the *Income Tax* cases has

repudiated that construction of the constitution and has held that a direct tax may be levied upon personal property. The basis of that decision is clearly repudiated.

In the case of *Nicol v. Ames*, 173 U. S., 509, decided at the last term of this court, the tax sought to be impeached as unconstitutional was a tax authorized by this same act of June 13, 1898, upon the facilities made use of and actually employed in the transaction of business on boards of trade or exchanges of various kinds, which tax was separate and apart from the business, but was only upon the facilities made use of at particular places.

The language of the act is this:

“ Upon each sale, agreement of sale or agreement to sell, any products or merchandise at any exchange or board of trade, or any similar place, either for present or future delivery, for each one hundred dollars in value of said sale, or agreement of sale, or agreement to sell, one cent, and for each additional one hundred dollars, or fractional part thereof, in excess of one hundred dollars, one cent, provided that on every sale, or agreement of sale, or agreement to sell, as aforesaid, there shall be made and delivered by the seller to the buyer a bill, memorandum, agreement or other evidence of such sale, agreement of sale, or agreement to sell, to which there shall be a lawful stamp or stamps in value equal to the amount of the tax on such sale ”

The opinion of this court was delivered by Mr. Justice PECKHAM. In the course of his opinion he said:

“ As a mere abstract scientific or economic problem, a particular tax might possibly be regarded as a direct tax, *when, as a practical matter pertaining to the actual operation of the tax, it might quite plainly appear to be indirect.* Under such circumstances and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of in-

validating the tax, *in placing it in a class different from that in which its practical results would consign it.*"

This is an accurate and exact statement touching the question in controversy; that it is always incumbent upon the courts to look to the actual operation of the tax to see whether or not it is direct or indirect. If there even be a doubt about the person upon whom the ultimate payment of the tax is cast, then the courts will construe such a tax as indirect in order to sustain the constitutionality of the law; but if there be no doubt as to who will ultimately pay the tax, then there can be no escape from the conclusion that it is direct.

Lord Chancellor Selborne (Sir Roundell Palmer), in the *Attorney General v. Reed*, L. R. 10 Appeal Cases (Privy Council), 144, sustains this position. In that case every instrument offered in evidence in a law suit required a 10-cent (Canadian money) revenue stamp to be attached by the party offering the same, and the amount of such stamps was at the end of the lawsuit to be charged against the losing party as costs. It could not be told during the progress of the case and at the time of payment where the payment would finally rest, whether upon the plaintiff or defendant.

LORD SELBORNE said:

"In most proceedings of a contentious character the person who pays it is a litigant expecting or hoping for success in the suit; and, whether he or his adversary will have to pay it in the end, must depend upon the ultimate determination of the controversy. The legislature, in imposing the tax, cannot have in contemplation, one way or the other, the ultimate determination of the suit, or the final incidence of the burden, whether upon the person who had to pay it at the moment when

it was exigible, or upon any one else. Therefore it cannot be a tax demanded 'from the very persons who it is intended or desired should pay it'; for in truth that is a matter of absolute indifference to the intention of the legislature. And, on the other hand, so far as it relates to the knowledge which it is possible to have in a general way of the position of things at such a moment of time, it may be assumed that the person who pays it is in the expectation and intention that he may be indemnified; and the law which exacts it cannot assume that that expectation and intention may not be realized. As in all other cases of indirect taxation, in particular instances, by particular bargains and arrangements of individuals, that which is the generally presumable incidence may be altered. An importer may be himself a consumer. Where a stamp duty upon transactions of purchase and sale is payable, there may be special arrangements between the parties determining who shall bear it. The question whether it is a direct or an indirect tax cannot depend upon those special events which may vary in particular cases; *but the best general rule is to look to the time of payment; and if at the time the ultimate incidence is uncertain, then, as it appears to their lordships, it cannot, in this view, be called direct taxation.*"

This is a clear definition, and falls within the statement made by Mr. Justice Peckham in the opinion in *Nicol v. Ames, supra*. At the time of the payment of the tax for the facilities of doing business on a board of trade, it cannot be ascertained who will eventually pay that tax, whether it will be wholly borne by the seller or by the purchaser, but there being a possibility or a probability that it will finally be borne by the purchaser, then it is indirect, according to all the definitions. Before it can be a direct tax it must be certain at the time of payment that the burden cannot be shifted.

This is well illustrated in the opinion in the case of *Nicol v. Ames*, in the court below, where the late Justice Showalter delivered the opinion.

See *Nicol v. Ames*, 89 Fed. Rep., 144.

There, speaking of the taxation attempted upon such privilege, Justice SHOWALTER said:

“For, while the privilege taxed is his own property, the patron or employer enjoys to some extent the benefit resulting from the use of the privilege, but this tax amounts in reality to an expense in transferring commodities from the producer to the ultimate consumer. *The latter, in the last analysis, foots the bill. The tax is absorbed in the ultimate costs and the consumer eventually pays it.*”

Mr. Justice PECHHAM, when that case came to this court, substantially lays down the same principle, where he says (173 U. S., 520):

“It is also said that the tax is direct because it cannot be added to the price of the thing sold and therefore be ultimately paid by the consumer. In other words, that it is direct, *because the owner can not shift the payment of the amount of the tax to some one else.*”

This court necessarily held in that case that the tax there in question did not or might not ultimately fall upon the seller, and that it was an indirect tax because *it might not ultimately fall upon the seller*, but upon the consumer as part of the price paid by him.

This facility for selling upon the board of trade is of itself property. The tax levied was not an indirect tax because the property taxed was intangible property or a chose in action, but it was an indirect tax because the tax might be shifted upon the purchaser, as stated by Justice Showalter in the court below, and that the pur-

chaser or the consumer of the commodity sold would in all probability finally pay the tax. This is the true test and is in accordance with the opinion of Lord Chancellor Selborne; as well as that of Lord Hobhouse in the case of *Bank of Toronto v. Lambe*, L. R. 12 Appeal Cases (Privy Council), 575-581.

This court will not treat lightly a question of great constitutional importance, but at the same time it will not be led astray by any legal will-o'-the-wisp. Every author, every court, every writer upon political economy that we have examined, agrees upon a definition of a direct tax so far as this particular principle is concerned, viz., that when the ultimate incidence is clearly upon the person taxed and cannot be shifted to any other person, it is a direct tax. If there be any doubt as to his ability to shift the same, or if he may even shift the same under some circumstances, the court will not hesitate to treat it as an indirect tax, rather than to hold the law unconstitutional; but in the case at bar there is no possibility of pointing to any person who must eventually or possibly or probably pay the tax so imposed *other than the legatees or next of kin*.

This court in *Nicol v. Ames* conceded that a tax for a license to do a particular business or a tax upon a business itself so transacted is a tax upon the property so dealt in. Such is the undoubted law as established by the court in many cases.

Brown v. State of Maryland, 12 Wheat., 419.

Cook v. Pennsylvania, 97 U. S., 566.

Almy v. California, 24 Howard, 169.

In the case of *Cook v. Pennsylvania*, *supra*, Justice

Miller reviews in his masterly way all the decisions up to that date touching this proposition. It was held that in all such cases such an attempt to tax the right to sell property or to deal in property or to hold property is a tax upon the property itself. In *Almy v. California*, above cited, the court holds that a stamp upon a bill of lading is an indirect tax upon the person so receiving the article shipped and not a direct tax upon the shipper who originally makes the consignment, and for the reason that the person making the payment for the stamp can shift it ultimately upon the receiver or consumer.

And in the case of the *State Freight Tax*, 15 Wall., 232, *Mr. Justice Strong* says:

"The case presents the question whether the statute in question so far as it imposes a tax upon freight taken up within the state and carried out of it or taken up outside of the state and delivered within it, or in different words, upon all freight other than that taken up and delivered within the state, is not repugnant to the constitution of the United States."

It was argued that the tax was one upon the business and franchises of the railroad companies which were required to pay it. But the court reviewing the authorities said:

"The inquiry was upon whom did the burden really rest and not upon the question from whom the state exacted payment into its treasury."

The *Income Tax* cases also hold that a tax upon the income is a tax upon the property from which the income is derived.

The court says in *Nicol v. Ames*, *supra*, that the tax levied was upon the privilege, opportunity or

facilities offered at boards of trade or exchanges for the transaction of the business mentioned, and that it was not a tax upon the business itself which is so transacted. And while it concedes that the tax levied upon a privilege or permission to do business or upon the business itself is a tax upon the property, yet it says that a tax upon such facility made use of is not a tax upon the property transferred.

This statement may be seriously doubted; but if it were conceded to be true, nevertheless, the facility itself is property in its broadest sense, of which a party could not be deprived without due process of law; and taxation on such facility is an indirect tax, not for the reason that it is a facility or privilege, but for the reason that the burden of such tax may be shifted upon another person and is finally paid by the consumer of the article sold by reason of the facility offered. *This is what made the tax upon such facility an indirect tax or excise or duty and not the fact that the facility taxed was an intangible thing.*

We make no progress by calling a certain tax an excise or a duty and therefore an indirect tax, because before we can ascertain whether it is an excise or a duty we must also ascertain whether it is an indirect tax, because if it be classed as a direct tax then it cannot be classed as an excise, or duty, properly speaking.

This court in *Nicol v. Ames*, *supra*, said:

“It is also said that the tax is direct because it cannot be added to the price of the thing sold, and therefore ultimately paid by the consumer. In other words, that it is direct because the owner cannot shift the payment of the amount of the tax upon some one else. *This, however, assumes, that the tax is not in the nature of a duty or an excise, but that*

it is laid directly upon the property sold, which we hold is not the case. It is not laid upon the property at all, nor upon the profits of sale thereof, nor upon the sale itself, considered separately and apart from the place and circumstances of the sale."

It seems to us in the foregoing sentence that this court reasons in a circle, because it *assumes* that the tax in that case was in the nature of a *duty or an excise* and therefore was an indirect tax. But, as a matter of fact, in that case it was an indirect tax and for that reason was in the nature of a duty or an excise. It seems to us the court there treats the *effect as the cause* and the *cause as the effect*, because no tax can be a duty or an excise unless it be indirect in its character.

You cannot define a duty or an excise except by ascertaining whether it is direct or indirect. Such facilities for doing business at a particular place are property, although not of the same character as the wheat or corn sold, but nevertheless it was a tax upon property and it was properly held to be in the nature of an excise or duty, but the reason of its being an excise or duty was that it could be shifted upon the purchaser or final consumer, and would not or might not rest primarily and ultimately at the time of payment upon the seller. There can be no definition of an excise or duty which does not embrace the idea that the tax is added to the article sold and that the whole is finally shifted, or may be shifted upon and paid by the person acquiring the article. concerning which the facilities existed.

There is nothing illusive in the definition of a duty or an excise, but it must always be tested by ascertaining whether the same may ultimately fall upon, or be paid by, another person. If it does not, it is a direct tax; if it does,

it is indirect, and is then an excise or duty. So the decision in *Nicol v. Ames* in no manner changes the character of the privilege taxed in this case, if it be a privilege, or the right to inherit, that is taxed, and not the legacies or distributive shares themselves; and that case in no manner militates against our position in this case, because in this case the tax levied, whether it be upon the privilege or upon the property, is not indirect inasmuch as it cannot be shifted upon any other person, but is a direct tax upon such property, be it a privilege or be it a legacy. A privilege or a right is of precisely the same value as the thing procured by reason of such privilege or right, and constitutes property to the same extent.

A tax on the right to inherit is a tax on the enjoyment of the inheritance, and a tax on the enjoyment of the inheritance can be paid only by the one enjoying it, and can never be cast upon another.

The same is true if the tax is on the legacy instead of the privilege. Whichever theory of the tax is adopted, it is not an indirect tax.

The case of *Scholey v. Rew*, heretofore referred to, is based upon the *Hylton* case and the case of *Insurance Co. v. Soule*, *supra*. In that case, this court by Justice CLIFFORD, held that the tax was upon the succession or right to inherit the real estate, and consequently that it was not a tax or duty on land, nor a capitation tax, and, therefore, in accordance with the *Hylton* case, it was an excise and indirect tax. We concede that a tax upon the succession or devolution of real estate would not be a tax upon real estate but it would be a tax upon personal property, such right or devolution being personal property. The court

in that respect followed the *Hylton* case and held it to be an indirect tax, saying also:

“Whether direct taxes in the sense of the constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term *does not include the tax on income which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.*”

But this court now holds in the *Income Tax* cases that a direct tax can be levied upon personal property, and that an income tax is unconstitutional and void, and hence not only the authorities but the reasoning and conclusions in *Scholey v. Rew* are without foundation, and that case is not controlling but has been overruled by the *Income Tax* decision.

It is perfectly apparent in the *Scholey* case that the person subjected in the first instance to the tax could not shift the burden upon any other person, and hence it could not under the decisions since made be held an indirect tax.

Under our second point we have shown that *successions* or the right to inherit are creations of the state government under its reserved powers, and that laws passed by the state legislature to carry into execution the powers vested in the state government cannot be retarded, impeded, burdened or controlled by the federal government, and hence the right of succession granted by the state government is a right which cannot be taxed by the federal government.

The court, in its decision in *Scholey v. Rew*, *supra*, entirely overlooked this constitutional principle which was apparently not in the mind of the court in that case and for that reason the decision is to be disregarded.

I V .

If it be held to be an indirect tax then the law violates the constitutional rule of uniformity in the following respects:

- (a) *That it imposes a tax progressive in its nature;*
- (b) *That it discriminates among persons in the same class;*
- (c) *That it creates exemptions in favor of private individuals and for private purposes and not for any public use or benefit.*

It is in contravention of Par. 1, Sec. 8, Art. 1, of the constitution, which provides that "All duties, imposts and excises shall be uniform throughout the United States," and also in contravention of the spirit of the fourteenth amendment, which provides: "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws."

The act in question creates classes of persons who are to be taxed at a certain rate according to the amount of the legacies or distributive shares received by them, which is to vary according to the *amount of the estate* out of which such legacies or distributive shares are to be paid; that is, a person receiving a legacy of five thousand dollars out of an estate of twenty-five thousand dollars, and who stands in a certain relation to the decedent, is to be taxed less than if he received a legacy of five thousand dollars out of an estate of one hundred thousand dollars or out of an estate of five hundred thousand dollars, or out of an estate of one million dol-

lars, the rate varying in each instance according as the size of the estate out of which it is to be paid varies.

The statute reads as follows on this subject:

"Sec. 29. * * * Where the *whole amount* of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"*First.* Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestors, brother or sister, of the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

"*Second.* Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

"*Third.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

"*Fourth.* Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

"*Fifth.* Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or

shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest, *provided*: that all legacies or property passing by will or by the laws of any state or territory to the husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty.

“Where the amount or value of such property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half, and where the amount or value of such property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half, and where the amount or value of such property shall exceed the sum of one million dollars such rates of duty shall be multiplied by three.”

It will be seen, therefore, that each of the above five classes is subdivided into four classes, based upon the value of the whole amount of the personal property of the deceased when more than \$25,000, regardless of the amounts of the individual legacies. The classifications clearly are based upon the value of the *whole* personal property of the deceased, and not upon the value of the legacies.

Secretary of the Treasury Gage, and Mr. Scott, the Internal Revenue Commissioner, as I understand, have so held. Thus, a child receiving a legacy of \$5,000 out of its father's estate, which is of the value of \$25,000, pays a tax of \$37.50; a child receiving a legacy of \$5,000 out of the estate of its father, which is of the value of

\$100,000, pays \$56.25; if he receives \$5,000 out of the estate of his father, which is of the value of \$500,000, he pays a tax of \$75; if he receives \$5,000 out of the estate of his father, which is of the value of \$1,000,000, he pays a tax of \$93.75; and if he receives a legacy of \$5,000 out of the estate of his father, which is of the value of over a \$1,900,000, he pays a tax of \$112.50.

Take a stranger in blood, if he should receive a legacy of \$5,000 out of an estate of the value of \$25,000, he pays a tax of \$250; if he should receive \$5,000 out of an estate worth \$100,000, he pays a tax of \$375; if he should receive \$5,000 out of an estate of \$500,000, he pays a tax of \$500; if he receives \$5,000 out of an estate of the value of \$1,000,000, he pays \$625; and if he should receive \$5,000 out of an estate of over \$1,000,000, he pays a tax of \$750.

So it is clear that there is no uniformity in the same class, and this want of uniformity is not based upon any reasonable grounds or difference in circumstances; that the difference in the tax between the persons receiving the same legacy does not bear a just relation to the attempted classification, and is a mere arbitrary selection. No reason occurs to us why persons receiving the same amount of legacy or distributive share, standing in the same relation to the testator, should be taxed differently, and not uniformly.

Suppose the value of A's personal property to be \$25,000, and the value of B's \$2,000,000.

C, a stranger in blood, receives a legacy of \$10,000 from A's estate.

D, a stranger in blood, receives a legacy of \$10,000 from B's estate.

The tax on C's legacy is \$500.

The tax on D's legacy is \$1,500.

The legatees receive the same amount. There is no relationship between the parties. They possess the same privilege and to the same extent, but one pays three times as much as the other.

A stronger illustration of the inequality of this law is the following: If the value of A's personal estate be \$10,000, and his real estate be \$2,000,000, the whole estate being \$2,010,000 and the whole of his personal estate were bequeathed to C, a stranger in blood, C receives a legacy of \$10,000 without payment of any tax, whereas, if B's estate were altogether personal property, and were worth \$2,010,000, and D, a stranger in blood, receives a legacy of \$10,000, the same amount as C, he would be compelled to pay a tax thereon of \$1,500.

Both C and D in such case each receive a legacy of \$10,000. Both are strangers in blood. One pays no tax, and the other pays a tax of \$1,500.

The same illustrations above used hold good throughout all the classifications. There is no escape from the conclusion that Congress intentionally discriminated, and that the purpose of Congress was to make a large estate pay a higher rate than a small one. Certainly if it be a tax upon the estate of the deceased, then it is not uniform according to the amount of the estate, and if it be a tax upon the legacy or distributive share received by persons standing in the same relation to the decedent, then the tax is not uniform.

It seems to us that these classifications are based upon "mere arbitrary selection," and that the property in either instance is not taxed according to the same rate,

and that a discrimination is made which creates a want of uniformity within the meaning of the constitution.

The Illinois Inheritance Tax Law lays different rates upon legacies to strangers, depending upon differences in amount of the legacies. For instance, upon a legacy of \$10,000, the tax is \$300; on a legacy of \$20,000, the tax is \$800; on a legacy of \$50,000, the tax is \$2,500, and on a legacy of \$100,000, the tax is \$6,000. The Illinois law was upheld by this court in *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 289.

It will be noticed in the Illinois law the classifications are based upon the value of the individual legacies (the privilege enjoyed) and not as in the Federal law upon the value of the whole estate left by the testator. It was claimed by the opponents to the Illinois law that the classifications were arbitrary.

Mr. Justice McKENNA said :

“The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be claimed, according to the value of that inheritance. The condition is not arbitrary, *because it is determined by that value * * *.*”

Had this court held that the rate of the tax was regulated by the value of the whole estate (as was contended by counsel for Mrs. Magoun), instead of by the value of the legacy, or distributive share, it cannot be doubted that the law would have been held to be invalid, for the principle of uniformity requires that one man's property shall be taxed at the same rate as another man's property, and it was only supported upon the ground of the right of classification of the legacies received, and that after the classification was made the tax would then be equal upon all falling within that classification. It

seems that there are fifteen states now that have inheritance-tax laws, and in all such statutes the classifications are based upon relationship or want of it, and upon the value of the legacies. In none of them is it based upon the value of the whole estate—in none of them is such tax made progressive. No state legislature has ever attempted to pass such an arbitrary law, with the exception of Ohio, and the Supreme Court of Ohio, in *State v. Ferris*, 53 Ohio St., 314, held such statute to be invalid.

The statute in that case provided for progressive taxation, the same as the statute in question, namely, that a certain amount should be exempt, and next, that a legacy of the same amount received by persons standing in the same relation should be taxed more if the estate were large and less if it were smaller; that is, when the estate exceeds fifty thousand dollars and does not exceed a hundred thousand dollars, the tax was made one and one-half per cent. upon the legacy or distributive share, and when it exceeded a hundred thousand dollars and did not exceed two hundred thousand dollars, the tax was made two per cent. upon the legacy or distributive share, and when the estate exceeds two hundred thousand dollars and does not exceed three hundred thousand dollars, the tax should be three per cent. upon such legacy or distributive share, and so on, legacies of the same amount paying different rates according to the size of the estate out of which they were to be paid.

The court in that case held that the state had the power to tax the right of inheritance, but that the law in question was unconstitutional for two reasons, namely, the exemption of \$20,000 from taxation and the increase of the per cent. as the value of the estate increases. 53 O. St., 357.

The court said (p. 336):

"The right to receive the first \$20,000 of an estate not exceeding that sum is protected from taxation, while the right to receive the first \$20,000 of an estate exceeding that sum is taxed the sum of \$200. This is not equal protection. *Again, the right to receive \$50,000 worth of property of an estate not exceeding that sum is taxed \$500, while the right to receive \$50,000 of an estate exceeding that sum is \$750. This is not equal protection. The same may be said of other gradations provided for in the statute.*"

In *Gulf, Col. & Santa Fe v. Ellis*, 165 U. S., 150, Mr. Justice BREWER delivered the opinion of the court (p. 155), and said:

"But it is said that it is not within the scope of the fourteenth amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class, it is not obnoxious to the charge of denial of equal protection. While as a general proposition this is undeniably true (citing cases), yet it is equally true that such classification cannot be made arbitrary. The state may not say that all white men shall be subjected to the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or *all men possessed of a certain wealth*. These are distinctions which do not furnish any proper basis for the attempted classification. *That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrary and without such basis.* * * * 'Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. *The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws*

and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will contend that competency to contract may be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.' "

Justice BREWER then proceeds:

" But arbitrary selection can never be justified by calling it classification. * * * No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice MATTHEWS, speaking for this court in *Yick Wo v. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government."

The court then quotes from the decisions of several other states and we call attention to what he says in regard to the decisions in Illinois. He proceeds (p. 164):

" *Millet v. People*, 117 Ill., 294, in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner, was held invalid, as beyond the power of the legislature to single out certain individuals and impose upon them burdens not imposed upon all. *Froser v. People*, 141 Ill., , where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employes was held in conflict with the constitution. *Braceville Coal Co. v. People*, 147 Ill., 66, where a like ruling was made in respect to a

statute requiring certain specified corporations to pay the wages of their employes weekly. *Eden v. People*, 161 Ill., 296, which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work at their trade on Sundays. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification and is not a mere arbitrary selection."

There are many other cases in this court laying down the same principle.

See

Bell's Gap R. R. v. Pennsylvania, 134 U. S., 232.

Giozza v. Tiernan, 148 U. S., 657.

Kentucky R. R. Tax cases, 115 U. S., 321.

Hallinger v. Davis, 146 U. S., 314.

Barbier v. Connolly, 113 U. S., 27.

Mugler v. Kansas, 123 U. S., 623.

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283.

In re Greice, 79 Fed. Rep., 627.

Railroad Tax cases, 13 Fed. Rep., 722.

The *Magoun case*, *supra*, construed the Illinois inheritance tax, and this court, by Mr. Justice McKenna, in that case stated in no uncertain tone the doctrine for which we contend and which seems to us decisive of the case at bar.

It is as follows:

"The clause of the Fourteenth Amendment

especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.'

* * * *It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.* * * *

The rule * * * only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A more than B; * * * in other words, the state may distinguish, select and classify objects of legislation. * * * It is not without limitation, of course. *'In all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'*

“* * * If the law operates ‘equally and uniformly upon all persons in similar circumstances’ * * * it requires that the law imposing it shall operate upon all alike under the same circumstances.”

Does this law operate equally and uniformly upon all persons in similar circumstances? Does it operate on all alike under the same circumstances? We have pointed out that Congress has created a classification and has imposed a tax at different rates upon persons within the same class and upon persons under the same circumstances. Persons, for instance, receiving \$5,000 of a legacy or distributive share, who stand in the same relations to the testator or intestate, are taxed more under same circumstances than others of the same class.

We admit that the decisions above referred to were all delivered in the construction of the operation of the Fourteenth Amendment. While it may not be true that the Fourteenth Amendment, as such, has binding force upon the Congress of the United States, nevertheless, Par. 1, Sec. 8, Art. 1, of the Constitution of the United States asserts the same principle of equal protection as follows:

“That all duties, imposts and excises shall be uniform throughout the United States—”

Congress is necessarily controlled by this provision in all its legislation, and all duties, imposts and excises must be uniform throughout the United States; and this article has the same significance in its operation upon the general government that the Fourteenth Amendment has upon the state governments, that is, that every person within the jurisdiction of the general government is entitled to the equal protection of the laws—they shall be uniform in their operation so far as taxation is concerned.

So that we do not perceive that the decisions under the Fourteenth Amendment are not strictly applicable to the clause of the constitution just referred to. The court is created especially for the purpose of maintaining the limitations of the Constitution of the United States.

Mr. Justice HARLAN, in *Mugler v. Kansas*, *supra*, said:

*“There are of necessity limits beyond which legislation cannot rightfully go. While, if possible, presumption is to be indulged in favor of the validity of a statute * * * the courts must obey the constitution rather than the law-making department of the government, and must, upon their own responsibility, determine whether, in any particular*

case, these limits have been passed. 'To what purpose,' it was said in *Marbury v. Madison*, 1 Cranch, 137, 176, 'are powers limited and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."

If this court will now look into the substance of this act, we think it will perceive that Congress has passed the limit fixed by the constitution, and has undertaken to create a tax which does not operate uniformly throughout the United States, but taxes one person more upon the same object than it taxes another, occupying the same relation and under the same circumstances.

Moreover, a classification made by the state legislature regarding a rule of descent cannot be made use of by the Federal government to support this law, because of the want of power in the Federal government to create rules of inheritance. A classification made by the state, which may be reasonable, owing to the power of the state to enact rules of descent and grant privileges, may be most arbitrary and unreasonable when adopted by the Federal government, which lacks such power.

We may also ask in this connection, can the general government create a classification of subjects to be taxed which have an existence under the legislation of the state and which would not exist as a subject to be taxed, but

for the power exercised by the state legislature? Can the general government make a different classification for the purpose of taxation of the same subject than the one made by the state legislature which created the right or granted the privilege so sought to be taxed? We contend that no such power exists in the general government. It has no power to legislate upon the question of inheritance, and hence it has no power to classify such rights for the purpose of taxation in a different way than they have already been classified by the state. This proposition does but involve the previous proposition discussed by us, namely, that the general government cannot in any manner *retard, impede, burden, abridge or otherwise control the operation of state laws or the powers of the state government.*

The Federal government has no power over such a subject and cannot create it and cannot destroy it by taxation or otherwise, and it cannot create classes out of such privilege for purposes of taxation, as the state may do. Such privileges have no existence, except as granted by the states, and the general government cannot arrange such privileges into classes different from what the state has arranged. We have no doubt that the general government may arrange classes of property which exist of *common right* for the purpose of taxation, but it cannot arrange into classes property which exists only by virtue of the grant of the legislature of the state government. This interferes with the power of the state government, as shown under point II.

(b) Not only are sections 29 and 30 of the act in question unconstitutional because of the progressive

character of the tax, but also on account of the exemption of all legacies to be received from the estates of the value of ten thousand dollars or less.

Exemptions can be legally allowed to individuals or corporations where the same are of some benefit to the public, as, for instance, the exemptions of churches and charities, and of persons who are entitled to pensions or to some compensation on account of public service rendered, or to protect families from poverty and to prevent such indigent parties from becoming a public charge;—or where the collection of the tax upon such property exempted would cost more than the tax levied, as in cases of poor people where the tax is small and the expense connected therewith large—the same as exemptions from executions of a small amount of property belonging to a poor person,—and such exemptions must therefore be based upon the peculiar relations of the parties to the community, and not arbitrarily.

Legacies are exempted by the statute in question not on account of the relation of the parties to the decedent, nor for any public purpose, but arbitrarily. Such classification is not “based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification,” but is a mere arbitrary selection, not based upon any reason.

Why should a person, for instance, who is a “stranger in blood, or a body politic or corporate,” that receives a legacy of \$5,000 or \$10,000 out of a personal estate of the decedent of the value of \$10,000 be not taxed, while a “stranger in blood, or body politic or corporate,” that receives a legacy of \$5,000 or \$10,000 out of an estate of more than the value of \$10,000, is compelled to pay a tax?

This law does not operate "equally and uniformly upon the persons in similar circumstances." The "stranger in blood, or body politic or corporate," are in similar circumstances in both cases, and it is a mere arbitrary distinction which taxes one and not the other. The party receiving the legacy in both cases may be of the same financial standing. They may both be rich or in good circumstances, and yet the exemption is allowed to one and not the other. The exemption is not based upon the idea that the person receiving the legacy is not able to pay the tax, or that the public would be in any way benefited, or that the state owes a duty to such individual which can be presumed by allowing such exemptions.

This same reasoning applies to the exemption of the widow, no matter what the size of the estate.

Judge COOLEY, in his work on Constitutional Limitations, 5th Ed., *p. 515, says:

"The power to determine the persons and objects to be taxed is trusted exclusively to the legislative department; *but over all those objects the burden must be spread or it will be unequal and unlawful as to such as are selected to make payment.*"

And in his work on *Taxation*, p. 214, 215, Judge COOLEY says:

"An exemption, it would seem, in order to be admissible ought to be either made on the basis of contract, in which case the public is supposed to receive a full equivalent therefor, or it ought to be made on *some ground of public policy*, such as might justify a pension or a donation of the public funds on some general rule all of which come within it may have the benefit; or such as, at least, makes the public at large interested in encouraging or favoring the class or interest in whose behalf the exemption is

made. *It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or a single article of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor.* Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation. * * * The motives of the exemption or the beneficial purposes expected to be accomplished by it can make no difference. No man is obliged to be more generous than the law requires; *each may stand strictly on his legal rights, and refuse to submit to any exaction that purposely is made more burdensome to him than the rules of law permit.* The legislature is equally powerless if the constitution has prescribed a rule of equality which forbids exemptions. Such a rule, it has been seen, is prescribed by the constitutions of some of the states, which, in terms or by necessary implication, require all private property in the state to be taxed in proportion to its value."

The rule of equality of the United States constitution, "that all duties, imposts and excises shall be uniform throughout the United States," forbids such exemptions.

In *Sutton's Heirs v. City of Louisville*, 5 Dana (Ky.), 28-31, the court, in discussing the limits of taxation, said:

"And that limit is, that a common burden should be sustained by common contributions, regulated by some fixed general rule, and apportioned according to some uniform ratio of equality. Thus, if a capitation or personal tax be levied, it must be imposed on all free citizens equally and alike; or if *ad valorem* or specific tax be laid on property, it must bear equally, according to value or kind, on all the property, or on each article, of the same kind, owned by every citizen; and no citizen or class of citizens owning any property of the kind subjected to taxation can be exempted constitutionally on any other ground than that of valuable and peculiar

public services; for otherwise, one man, or a 'set of men,' might be entitled to enjoy 'exclusive privileges,' or legal exemptions, which are substantially the same, without the only constitutional consideration of public services."

In the *City of Lexington v. McQuillan's Heirs*, 9 Dana (Ky.), 513, the court, Chief Justice ROBERTSON, delivering the opinion, said:

"Taxation may not be universal, but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no appropriated land within the limits of the state can be constitutionally exempted, unless the owner be entitled to such immunity in consequence of public service. The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one city, or even one county, the entire revenue for the whole commonwealth. * * *

"But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituents, members of the same community generally, as own the same kind of property. Taxation and representation go together. And representative responsibility is one of the chief conservative principles of our form of government. * * * And although there may be a discrimination in the subjects of taxation, still persons in the same class *and property of the same kind* must generally be subjected alike to the same common burden. This alone is *taxation* according to our notion of constitutional taxation in Kentucky. * * * The object of this great guarantee was to secure every citizen against spoliation by a dominant faction, or by a rapacious public power, acting in obedience to the will of a

constituent body for whose use his property may be taken, and from whom no similar contribution is required. And it was not a tax, because it was not general or public, but personal and exclusive, exacted by the public for its own use, from an individual alone, and not *from the public*."

It might be here stated that the number of legacies and distributive shares exempted under this law, being all legacies and distributive shares from estates of ten thousand dollars or less, constitute much the larger portion in number and amount of all legacies given or distributive shares taken throughout the United States. Legacies received from estates of over ten thousand dollars throughout the United States are much smaller in amount than the legacies which are exempted, and in this respect the case is similar to the exemptions in the Income Tax cases recently decided.

In *Barbour v. Louisville Board of Trade*, 82 Ky., 645, 653, the General Assembly of Kentucky, in order to establish a board of trade in Louisville to foster commerce in Kentucky, exempted the property of the Board of Trade from taxation. In discussing the illegality of the tax the court said:

"The exemption of this corporation from state taxation is a tax, to that extent, upon every citizen of the commonwealth, as every other citizen must help to bear the burden thus lifted from the corporation.

"As a general rule, *the test of the right to exempt property is the existence of the right to levy a tax to foster such property.* The levy of a direct tax upon the whole people of the state, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual,

it would strike anyone as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one there is unquestionably the power to exempt the other. * * * The object must appear upon the face of the legislation to be directly for the *public good*, and of such a character as to call for the aid of the state to forward it in the exercise of a governmental function. * * *

"Every citizen is entitled to equal rights and equal privileges with every other citizen. In entering into the social compact, called government, he stipulates to bear only his proportion of the common burden of taxation, and when more is imposed upon him, his property is taken against his consent and without consideration, it is spoliation. The exemption of charitable institutions and schools has always been recognized as valid, because done in the exercise of a governmental function; but private undertakings, primarily for private gain or aggrandizement in any way, cannot be protected individually and specifically by the government, but must come under general laws that operate alike upon all."

In *State ex rel. v. City of Indianapolis* the Supreme Court of Indiana, 69 Ind., 375-378, said:

"It is the use of the property *for the public benefit* which will authorize its exemption from taxation by law. To exempt by law private property owned by a private person *and used for a private purpose* on account of the sex or domestic relation of the owner is a violation of the constitutional principle that taxation shall be uniform and equal on all property, both real and personal. The common burden of taxation should be regulated by a fixed general rule, apportioned and sustained by uniform ratio of quality. Exemption from taxation should be based only on a well grounded public policy *by which all share in the benefits.*"

Now under the act in question the exemption is made

for the private gain or aggrandizement of the legatee taking such legacy, and in no way for the benefit of the public. The legatee taking a legacy from an estate of \$10,000 or under is as much responsible to bear his burden of taxation as a person taking a legacy of an estate of over \$10,000, unless it should appear in some way that the person receiving the benefit of such exemption has performed some duty to the public or that the exemption in some way redounds to the benefit of the public and not to the benefit of the individual taking the legacy.

This question is so thoroughly discussed by Mr. Justice Field, in his separate opinion in the *Income Tax* cases, that it would seem quite unnecessary to go farther than to refer to that opinion. The question here under consideration, although involved in the *Income Tax* cases, was not decided by the court, but Mr. Justice Field gave a very clear and lucid opinion therein touching the invalidity of such law on account of such exemptions.

The justice said (p. 592):

“The uniformity thus required is the uniformity throughout the United States of the duty, impost or excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum on the same article at another place. * * * Mr. Justice MILLER, in his lectures on the Constitution (N. Y., 1891, pp. 240, 241), said: ‘The tax must be uniform on the *particular article* and it is uniform within the meaning of the constitutional requirement if it is made to bear the *same percentage* over all the United States. This is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the government, in raising its revenue, should not be allowed to discriminate between the *articles* which it should tax.’

“In discussing generally the requirement of uni-

formity found in state constitutions, he said: 'The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word *uniformity*, which has been adopted, holding that the uniformity must refer to articles of the same class, that is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere with all people and at all times.

"*Exemptions from the operation of a tax always create inequalities, those not exempted must, in the end, bear an additional burden or pay more than their share. A law containing arbitrary exemptions can, in no just sense, be declared uniform. In my judgment, Congress has rightfully no power, at the expense of others, owning property of a like character, to sustain private trading corporations, such as building and loan associations, savings banks, and mutual life, fire, marine and accident insurance companies, formed under the laws of the various states which advance no national purpose or public interest and exist solely for the pecuniary profit of their members.*

"Where property is exempt from taxation the exemption, as has been justly stated, must be supported by some consideration that the *public*, and not *private*, interests will be advanced by it. Private corporations and private enterprises cannot be aided under the pretense that it is the exercise of the discretion of the legislature to exempt them. [The justice refers to the Kentucky cases referred to by us and others in support of his proposition.] Cooley, in his treatise on Taxation (2d Ed., 215), justly observes that: 'It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and, taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it would lack the semblance of legitimate tax legislation.'

"The income tax law under consideration is marked

by discriminating features which affect the whole law. It discriminates between those who receive an income of \$4,000, and those who do not. It thus vitiates, in my judgment, *by this arbitrary discrimination*, the whole legislation. * * * There is nothing in the nature of the corporations or associations exempted in the present act, or in their method of doing business, which can be claimed to be of a public or benevolent nature."

It seems to us that the reasoning of Mr. Justice Field is so potent as to determine the question at bar. It must be conceded that it was not the intention of Congress to tax the estate of decedent, but to tax the thing taken in the hands of the legatee or distributee, or the right to take the same, and there can be no object in this exemption except to benefit the legatees and distributees as private individuals, and is wholly an arbitrary discrimination, and was not made for the purpose of benefiting the public, but to advance interests of those receiving the legacies and distributive shares, and hence must be unconstitutional. This tax cannot be justified upon the ground of the right of Congress to create classifications for the purpose of taxation, because the persons receiving a \$5,000 legacy from an estate of \$10,000 belong to the same class of persons as those who receive a legacy of \$5,000 from an estate of \$100,000 or \$1,000,000, and are no more entitled to the protection of the government, as private individuals, in the one case than in the other.

It is but a socialistic attempt on the part of Congress to make one portion of the community bear the burdens of the whole. It is an entering wedge, which, in the end, will destroy all the limitations contained in the national constitution; and full power, if sustained, will finally be

exercised by Congress to make the few bear all the burdens by exempting the men of moderate means or of small means from any taxation and throwing it upon those who are more prosperous by reason of being more industrious. If there can be any exemption, once established, under the national constitution for the purposes of taxation, there can be no limit assigned whereby Congress may not impose the burdens of government upon the few and relieve entirely the many.

If Congress had confined itself to taxing all inheritances at the same rate there could be no fault found upon the ground of want of uniformity. But this law, in our judgment, is unconstitutional not only because it exempts the greater number of legacies and inheritances from any taxation, but because it discriminates in the progressive feature of the law and taxes persons receiving the same amount in one case at a higher rate than in another.

These two sections, 29 and 30, of the act of Congress, approved June 13, 1898, entitled "An Act to provide ways and means to meet war expenses and for other purposes," should be held unconstitutional, null and void, and the decree of the Circuit Court should be reversed and remanded with instructions, for the reasons hereinbefore stated.

ABRAM M. PENCE,

GEO. A. CARPENTER,

SHIRLEY T. HIGH,

Counsel for Appellants.



No. 225. October Term, 1899.

U.S. SUPREME COURT U. S.
FILED

OCT 16 1899

JAMES H. McKENNEY,

Clerk

IN THE

Supreme Court of the United States.

Shirley T. High et al. Executors v. Fidelity & Safe Deposit Co.

Shirley T. High et al. Executors, Appellants,

Filed Oct. 16, 1899.

F. E. Coyne, Collector, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
UNITED STATES, OF THE NORTHERN DISTRICT
OF ILLINOIS.

PETITION

Of the Fidelity Insurance, Trust and Safe Deposit
Company for leave to be heard by Counsel as
a party interested,

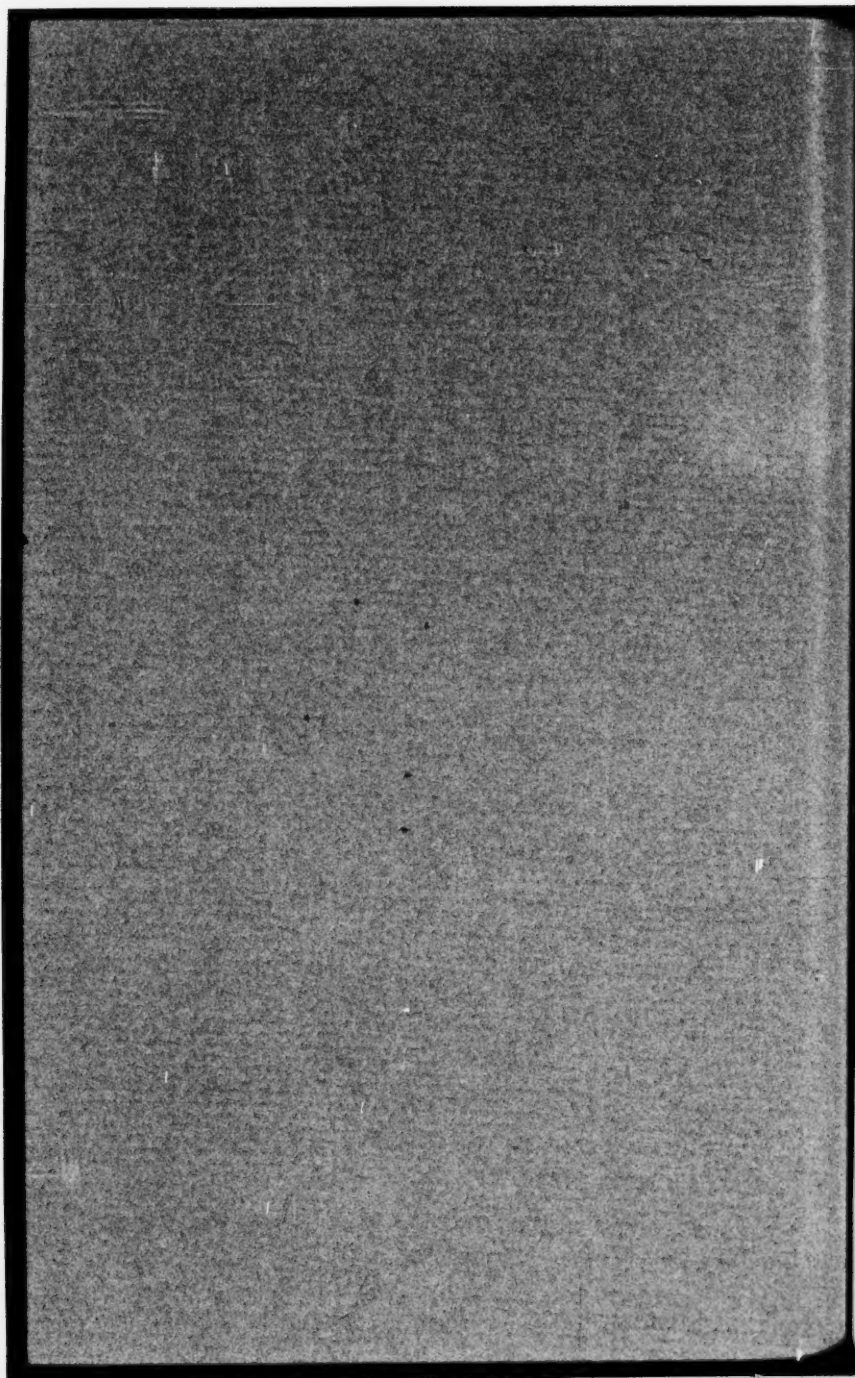
AND

BRIEF OF ARGUMENT

On the Constitutionality of the Act of Congress of
June 13th, 1898, imposing a tax on all personal
estates of decedents.

RICHARD C. DALE,
SAMUEL DICKSON,
JOHN C. BULLITT,

*Of Counsel for the Fidelity Insurance, Trust
and Safe Deposit Company.*



IN THE SUPREME COURT OF THE UNITED
STATES.

Shirley T. High, Executor,

vs.

F. E. Coyne, Collector.

} October Sessions, 1899.

} No. 225.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT:

The petition of the Fidelity Insurance, Trust and Safe Deposit Company respectfully shows:—

First.—That it is a corporation organized under the laws of the State of Pennsylvania, having its office in the city of Philadelphia, possessing under its charter the right to act as executor and administrator of the estates of decedents, and that it is interested in the determination of the question of the constitutionality of the provisions of the Internal Revenue Act of June 13th, 1898, which is involved in the appeal in the above-entitled case.

Second.—As executor under the will of Daniel Craig, your petitioner paid, under protest, to the Collector for the First Internal Revenue District of Pennsylvania, on May 9th, 1899, the sum of \$168.75, and after a petition for the refunding of the same, as prescribed by the Revised Statutes, had been refused by the Commissioner of Internal Revenue, your petitioner brought suit against said collector for the recovery of the same, which action is now pending in the Circuit Court of the United States for the Eastern District of Pennsylvania, as of October Sessions, 1899, No. 2.

Third.—Your petitioner is also the executor and administrator of numerous other estates in the settlement of which

taxes will be payable if the constitutional validity of the provisions of said statute be sustained.

The magnitude of your petitioner's interest in the question is disclosed by the following schedule showing the estates of decedents dying since June 13th, 1898, of which your petitioner is executor and administrator, and the estimated amount of tax payable thereon, as nearly as the same can now be determined:

NAME OF ESTATE.	APPROXIMATE TAX
Mary W. Johnson	\$2,300 00
Joseph Roberts	119 00
Matilda Dillard	315 00
Albert N. Heritage	187 00
James M. Hilsee	575 00
Redwood F. Warner	11,104 00
Catharine Ervien	125 00
David Fleming	10,900 00
Hannah B. Crosman	7,300 00
Douglass Ottinger	1,625 00
Elizabeth Auble	600 00
Joseph M. Bennett	42,000 00
Wm. Penn Cooper	175 00
F. Campbell Stewart	9,700 00
Walter H. Tilden	10,600 00
Emily M. Woolverton	2,100 00
Mary Dwyer	2,000 00
Sarah W. Lewis	3,000 00
Tacy W. Robbins	1,900 00
John N. Hutchinson	250,000 00
Jennie H. Leavitt	3,500 00
Philip Gruner	1,600 00
	<hr/>
	\$361,725 00

By reason of its interest therein your petitioner respectfully prays your Honorable Court to permit it to be heard by counsel upon the questions involved, and that counsel have leave to file the printed brief of argument, of which a copy accompanies this petition.

THE FIDELITY INSURANCE, TRUST AND SAFE
DEPOSIT COMPANY,

By

H. GORDON MCCOUCH,

Secretary.

STATE OF PENNSYLVANIA, }
EASTERN DISTRICT, } ss.

Before me, the undersigned, a notary public, residing in the city of Philadelphia, personally appeared H. Gordon McCouch, who, being duly sworn according to law, did depose and say: I am the secretary of the Fidelity Insurance, Trust and Safe Deposit Company; the statements of fact contained in the foregoing petition are just and true, as I verily believe.

H. GORDON McCOUCH.

Sworn to and subscribed before me, this fifth day of October, 1899.

W. C. HARRIS,
Notary Public.



IN THE SUPREME COURT OF THE UNITED
STATES.

Shirley T. High

vs.

F. E. Coyne, Collector.

} October Term, 1899.

} No. 225.

BRIEF PRESENTED ON BEHALF OF THE FIDELITY INSURANCE,
TRUST AND SAFE DEPOSIT COMPANY, EXECUTOR IN SUN-
DRY ESTATES, UPON THE CONSTITUTIONALITY OF THE FED-
ERAL TAX ON THE PERSONAL ESTATE OF DECEDENTS BY
ACT OF CONGRESS OF JUNE 13TH, 1898.

ABSTRACT OF ARGUMENT.

(a.) Congress has no power to legislate with reference to the devolution of estates of decedents or to regulate or control the exercise of the testamentary power of citizens of the several States. Legislative control over these matters is vested solely in the States. Hence an Act of Congress directing payment into the Federal Treasury of a certain percentage of decedents' estates cannot be sustained as an exercise of the legislative power regulating the devolution of decedents' estates. If upheld, it must be sustained as a valid exercise of the Federal taxing power.

Pages 5 to 10.

(b.) The tax imposed by the Act of June 13th, 1898, is not an excise upon the right to receive a legacy or distributive share of the estate of a decedent measured by the amount received, but a tax upon the property of

decedents in the hands of the executor or administrator, measured by the aggregate amount of the estate after the payment of debts—the rate of taxation increasing by a graduated scale whereby estates are divided into six classes for purposes of taxation.

Pages 10 to 14.

(c.) A tax imposed upon property as such, not being an excise upon the receipt of a legacy or upon the right to take a distributive share in a decedent's estate, is a direct tax within the meaning of the Federal Constitution, and hence must be apportioned among the States in proportion to the census.

Pages 14 to 30.

(d.) If the tax imposed be regarded, not as a direct tax, but as an excise, then Congress has failed to follow the constitutional rule of uniformity by directing that the tax be levied in accordance with a graduated scale whereby the rate of taxation increases as estates pass from a lower to a higher class for assessment—the line of demarkation between the several classes being simply a variation in the aggregate net amount of the estate of the decedent.

Page 30.

(e.) The rule of uniformity in taxation prescribed by the Constitution is not satisfied by a mere geographical uniformity. A uniform rate of taxation upon the same subject matter wheresoever situate within the limits of the taxing power is necessarily involved.

Pages 30 to 40.

(f.) To justify classification for taxation there must be substantial differences between the subject matters which are placed in the several classes, and the difference must relate to the subject matter which is classified—therefore accidental or collateral circumstances cannot be made the basis of classification. While the courts will not review

the legislative discretion involved in classification so long as the power is exercised upon rational lines, the courts have not hesitated to declare void statutes, which, if upheld, would involve a fraud upon the power.

Pages 40 to 50.

(g.) A classification, the only basis of which is that the unit of taxation is found with certain other units of specified number in a common ownership, is without reason—nay, more, it violates the fundamental American principle that the law makes no distinction between rich and poor.

Pages 50 to 52.

(h.) Any sanction to such distinction, either by legislative act or judicial decree, is calculated, by placing the burdens of government upon wealth, in the end to deprive the people at large of their due share in the conduct of government. That the powers of government are exercised by those who bear its burdens is the uniform testimony of history, and any class relieved by law from responsibility for the support of the State soon loses those characteristics of free citizenship which qualify it for participation in the privilege of a free government.

Pages 52 to 53.

(i.) Review of State decisions.

Pages 53 to 64.

ARGUMENT.

An Act of Congress, entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13th, 1898, in section 29, provides as follows:—

"That any person or persons having in charge or trust as administrators, executors, or trustees, any legacy or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing after the passage of this

Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be and hereby are made subject to a duty or tax, to be paid to the United States," shown in the following table:—

Degree of Consanguinity.

AMOUNT OF ESTATE.	Lineal issue, lineal ancestor, brother or sister.	Descendant of brother or sister.	Brother or sister of father or mother, or descendant of brother or sister of father or mother.	Brother or sister of grandfather or grandmother, or descendant of brother or sister of grandfather or grandmother.	Any other degree of consanguinity or stranger in blood or a body politic or corporate.
\$10,000 to \$25,000	75 c. per \$100	\$1.50 per \$100	\$3.00 per \$100	\$4.00 per \$100	\$5.00 per \$100
\$25,000 to \$100,000	\$1.12½ per \$100	\$2.25 per \$100	\$4.50 per \$100	\$6.00 per \$100	\$7.50 per \$100
\$100,000 to \$500,000	\$1.50 per \$100	\$3.00 per \$100	\$6.00 per \$100	\$8.00 per \$100	\$10.00 per \$100
\$500,000 to \$1,000,000	\$1.87½ per \$100	\$3.75 per \$100	\$7.50 per \$100	\$10.00 per \$100	\$12.50 per \$100
Over \$1,000,000	\$2.25 per \$100	\$4.50 per \$100	\$9.00 per \$100	\$12.00 per \$100	\$15.00 per \$100

Provided, that all legacies or property passing by will, or by the laws of any State or Territory, to *husband or wife* of the person died possessed as aforesaid, shall be *exempt* from tax or duty.

In the thirtieth section it is further provided:—

"That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share."

In the same section it is further provided that the receipts delivered by the collector for such payment—

"shall be sufficient evidence to entitle such executors, administrators, or trustees to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators."

FIRST.

Before discussing the proper interpretation of this statute, or of the constitutional validity of its provisions, it is important to define with certainty the source of the power of Congress to legislate upon the subject. Statutory enactments such as are embodied in this Act of Congress are not entirely new in State legislation, and have been sustained some times as an exercise of the taxing power vested in the State Legislature and some times as an exercise of the legislative power of the State over the distribution of the estates of decedents, either as a regulation of the power of an owner of property to dispose of it by will or as a modification of the intestate laws of a State. It is important to notice that if these provisions of the Act of Congress are to be sustained, it must be as a valid exercise of the power of levying taxes, vested in Congress by the Federal Constitution. Congress has no power to legislate with reference to the devolution of estates. No Act of Congress can limit or vary the testamentary powers of citizens of the respective States. No Act of Congress can modify the intestate laws of any State. No Act of Congress can designate the Federal Treasury as one of the distributees of a dead man's estate. All moneys collected from the estates of decedents which are to find their way into the Federal Treasury must come through a valid exercise of the taxing power vested in Congress. It is important to recall this difference between the legislative power of Congress and the legislative power of the several State legislatures. The distinction is clearly made in the opinion of Mr. Justice McKenna in *Magoun vs. Illinois Trust and Savings Bank*, 170 U. S.,

283. After reviewing the legislation of the various States upon the subject of Inheritance Taxation, he said:—

"It is not necessary to review these cases or to state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right or privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers and grant exemption and are not precluded from this power by the provisions of the respective State Constitutions requiring uniformity and equality of taxation."

In the case cited, the power of the Federal Supreme Court was invoked to set aside, as in conflict with the Federal Constitution, a statute which the Supreme Court of Illinois had decided was not in conflict with the Constitution of that State. On page 297 is a quotation from the opinion of the Supreme Court of Illinois, sustaining the statute as a valid exercise of the State's power to regulate the descent and devolution of a decedent's property:—

"By this Act of the legislature six classes of property are created heretofore absolutely unknown. It is those classes of property depending upon the estate owned by one dying possessed thereof which the State may regulate as to its descent and the right to devise. * * * No person inherits property or can take by devise except by the statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

This power of a State to regulate in the broadest manner succession to a decedent's property, as distinguished from the Federal power, had been recognized by the Supreme Court from the earliest times.

In *Mager vs. Grima*, 8 Howard, 490:—

"By a law of the State of Louisiana, every person not having a domicile in that State, and not being a citizen of any State or Territory in the Union, who shall be entitled, whether as

heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the State of ten per cent. of the value of the succession."

Mr. Chief Justice Taney said:—

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and term upon which property, real or personal, within its dominion, may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every State or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or as legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the State. In many of the States of this Union at this day, real property devised to an alien is liable to escheat. And if a State may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interest or policy."

The same principle was recognized in *United States vs. Fox*, 94 U. S., 315, where Mr. Justice Field, in affirming a decree entered in the Court of Appeals of the State of New York, that the United States were not competent to take lands in that State as devisee, said:—

"The sole question for our consideration in this case is the validity of a devise to the United States of real estate situated in the State of New York. The question is to be determined by the laws of that State. It is not pretended that the United States may not acquire and hold real property in the State, whenever such property is needed for the use of the Government in the execution of any of its powers: as, for instance, when needed for arsenals, fortifications, lighthouses, custom houses, court houses, barracks, hospitals, or for any other of the many public purposes for which such property is used. And when the property cannot be acquired by voluntary arrangement with its owners, it may be taken against their will by the United States in the exercise of their power of eminent domain, upon making just compensation—a power which can be exercised in their own courts, and would always be resorted to, if, through caprice of individuals or the hostility of the State legislature, or other causes, harassing conditions were attached to the acquisition of the required property in any other way. *Kohl vs. United States*, 91 U. S., 367. The power of the State

to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick vs. Sullivan*, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

And so in *United States vs. Perkins*, 163 U.S., 635, it was held that personal property in New York bequeathed by will to the United States is subject to an inheritance tax under the State law. Mr. Justice Brown sustained the power of the State thus to regulate the transmission or devolution of a decedent's property, saying:—

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings and to the enjoyment of his own property and the increase thereof during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute, and within legislative control. 'By the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety and the other went to his children; and so, *e converso*, if he had no children the wife was entitled to one moiety and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Com., 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII., the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never

existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute.

"By the Code of Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one-half of the estate if the testator leave but one child; one-third, if he leaves two children; one-fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy, one-half of testator's property must be distributed equally among all his children; the other half he must leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the State of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good.

"In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, the right to dispose of his property shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. Thus the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

The same principle is expressed in the opinion of the Court of Appeals of New York in the matter of the estate of Swift, 137 N. Y., page 77:—

"The idea of this succession tax, as we may conveniently term it, is more or less compound; the principal idea being the

subjection of property, ownership of which has ceased by reason of the death of its owner, to a diminution, by the State reserving to itself a portion of its amount, if in money, or of its appraised value if in other forms of property. The accompanying or the correlative idea should necessarily be that the property, over which such dominion is thus exercised, shall be within the territorial limits of the State at its owner's death, and therefore subject to the operation and the regulation of its laws. The State, in exercising its power to subject realty or tangible property to the operation of a tax, must, by every rule, be limited to property within its territorial confines."

So in the opinion of Mr. Chief Justice Fuller in *Pollock vs. The Trust Company*, 157 U. S., at 578, in referring to the grounds upon which the previous decision of this court in *Scholey vs. Rew*, 23 Wallace, 331, could be supported, it was remarked of the tax levied under the Internal Revenue law of 1864:—

"It was like a succession tax of a State, held constitutional in Mager vs. Grime, 8 How., 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court."

It would seem unnecessary to further enlarge upon the proposition. It may be assumed as indisputable that if the provisions of the Act of 13 June, 1898, are upheld, they must be sustained as an exercise of the taxing power conferred upon Congress by the Federal Constitution.

If we have established our position that the source of the power of Congress to enact this statute must be traced to the taxing power, we will now proceed to a discussion of the proper interpretation of the statute and its constitutional validity.

SECOND:

The provisions of this statute differ very materially from the Succession Tax clauses of the Internal Revenue Act of June 30th, 1864, as amended by the Act of July 13th, 1866, which were the subject of construction by the Su-

preme Court in *Scholey v. Rew*, 23 Wallace, 337, and which were as follows:—

“That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this Act, shall be deemed to confer on the person entitled by reason of any such disposition a ‘succession.’ * * *

“There shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof, duties at rates depending upon the degree of consanguinity between predecessor and successor; and where the successor is a stranger in blood, at the rate of six per cent.

“That the duty shall be paid at the time when the successor, or any person in his right or on his behalf shall become entitled in possession to his successor, or to the receipt of the income and profits thereof.”

In *Scholey v. Rew* the court held that the Succession Tax of 1864 was not a direct tax upon property, but an excise or duty upon the succession or devolution of title, and this construction was clearly warranted by the language of the Act of 1864, just quoted.

The language found in the twenty-ninth section of the Act of June 13th, 1898, is in striking contrast to that construed in *Scholey v. Rew*. In the Act of 1898, the effective words are:—

“That any person or persons having in charge or trust as administrators, executors, or trustees any legacies or distributive shares arising from any personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000, * * * shall be and hereby are made subject to a tax or duty, to be paid to the United States.”

And by the thirtieth section the tax or duty thus imposed is made a lien or charge upon the property of the decedent until payment of the tax to the collector of the district of which the decedent was a resident.

It will also be noticed that the provisions of the Act of 1898, quoted above, materially differ from the sections

of the Internal Revenue Act of 1864, imposing a tax upon legacies and distributive shares of personal property.

13 Statutes at Large, pages 285-6-7, sections 124, 125.

While the draughtsman of the Act of 1898 to a considerable extent copied the phraseology of the Act of 1864, as to the tax on legacies, a striking contrast is found:—

First, in the exemption from tax being limited in the Act of 1864 to \$1000, while in the Act of 1898 estates not exceeding \$10,000 are exempt:

Second, in the graduated scale by which the rate of tax increases in proportion, not to the amount of the legacy received by the distributee, but in proportion to the aggregate amount of the personal estate passing from the decedent to all the legatees and distributees.

While it does not appear that the provisions of the Act of 1864, with reference to the tax on legacies and distributive shares, ever received judicial construction upon the question whether the tax there imposed was a tax on property, as distinguished from an excise on the right to take a legacy or distributive share, it may be admitted, for the purpose of this argument, that the court might have decided that under the Act of 1864 a uniform excise was imposed upon all persons of the same degree of consanguinity receiving legacies or distributive shares from the estates of decedents. No such construction can be given to the clauses of the Act of 1898 imposing a tax upon that portion of the personal estate of a decedent passing in legacies and distributive shares. The percentage of tax payable does not depend upon the amount of the legacy received or of the share passing in distribution. It is determined solely by the total net amount of the estate of the decedent remaining after payment of debts and expenses. Take the most simple illustration. Upon estates exceeding \$10,000, and not exceeding \$25,000, the rate of tax is seventy-five cents per \$100 where the estate is distributable among the children of the decedent. If a testator leaves one child to whom an estate of \$20,000

would descend, the tax chargeable against this distributive share of \$20,000 would be \$150. If, however, the testator left an estate of \$60,000 to be divided between three children, each child receiving \$20,000, the tax would be at the rate of one dollar and twelve and one-half cents per \$100, or \$250 for each \$20,000. The degree of consanguinity is the same, the amount of the legacy is the same, but the child of a father leaving an estate of \$60,000 would be charged fifty per cent. greater tax upon the same legacy than the child of a father leaving an estate of \$20,000. This is the simplest illustration of the unequal operation of the tax, and shows that if it be treated as an excise tax on the right of a child to receive a legacy of \$20,000 by a child, its operation is not uniform. An indefinite number of illustrations could be presented of its operation, which will readily occur to any one examining the schedule printed at page 4 of this brief.

These suggestions are presented at this stage of the argument, not for the purpose of invoking the constitutional rule of uniformity which is to be hereafter discussed, but for the purpose of showing that it cannot be assumed that the words of the statute are to be given a different construction from the plain and primary import of the words whereby the tax is imposed as a tax on property, and not as an excise duty on the right to receive a legacy or distributive share.

We are justified, therefore, at the outset in asserting that by the Act of 1898, Congress has imposed upon all personal property in the hands of executors or administrators, passing to legatees or distributees, a tax measured, not at a defined rate upon the total amount of each estate, nor even at a defined rate upon legacies of equal amount to persons of equal degree of consanguinity, but in accordance with a graduated scale whereby all estates are to be divided into six classes, and the rate upon the several classes increases in a graduated proportion, as shown in the foregoing table.

The validity of the Act is now questioned upon two grounds:—

First.—That this tax being a tax imposed upon property

and not upon the legacy or the right of succession, it is a direct tax, and therefore can only be levied in accordance with the rule of apportionment prescribed by article I., section 9, of the Constitution:—

“No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.”

and article I., section 2:—

“Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers.”

Second.—If this tax be not a direct tax within the meaning of the Constitution, but is to be treated as a duty or excise, then it fails to conform to the rule of uniformity prescribed by article I., section 8, of the Constitution, in which the taxing power is conferred:—

“The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States, but all duties, imposts, and excises shall be uniform throughout the United States.”

THIRD.

Is the Tax Imposed by the Act of 1898 a Direct Tax?

It would seem unnecessary to review all the matters elaborately discussed in the arguments of counsel and the opinions of the several judges filed in *Pollock vs. Farmers' Loan and Trust Company* 157 U. S., 429; 158 U. S., 601. The difficulties which surrounded the determination of the legal question involved in that case are not present here, unless the narrowest definition ever suggested for a direct tax be adopted, to wit, “that the term is limited to a capitation tax and land tax.” The tax imposed by the Act of 1898 being a tax specifically upon property, and not upon the enjoyment or use of it, must be construed to be a direct

tax. That a direct tax should be limited by definition to a capitation or poll tax and taxes on lands and buildings, involves a much narrower construction of the Constitution than was suggested by Alexander Hamilton in his argument in *Hylton v. The United States*, 3 Dallas, 171, quoted with approval in the opinion of Mr. Justice Swayne, in *Springer v. United States*, 102 U. S., at page 598. The definition suggested by Hamilton is that direct taxes be held to be only—

“Capitation or poll taxes, and taxes on lands and buildings, and general assessments, whether on the whole property of individuals or on their whole real or personal estate. All else must of necessity be considered as indirect taxes.”

The tax under consideration is a tax imposed, not on the right of legatees or distributees to receive a legacy, but on the entire personal estate of every decedent after deduction of the decedent's debts—a tax computed in the same way as an ordinary tax on the entire personal estate of a living owner, by an assessment of the surplus which remains after deducting sufficient to pay the owner's debts. By such deduction the assessment does not lose its quality as a general assessment on the whole personal estate of the party taxed.

This definition of Hamilton was quoted with approval in the opinion just referred to and is a far more rational definition than that which has found its way into some text books and legal writings, that direct taxes are limited strictly to capitation taxes and taxes on landed estates. Mr. Justice Swayne points out, as has been repeatedly noticed in other cases, that the real occasion of the apportionment clause was the determination of the Southern members of the Federal Constitutional Convention to deprive Congress of the power to impose a tax on slaves. Constitutional provisions in their operation are not to be limited to the particular circumstances which may have been the occasion of their adoption. Constitutional enactments are the expression of the fundamental principles which are to control the governmental powers of the

Union. But it is important to know the occasion of their adoption. Such knowledge throws light upon their real meaning. To protect the slave-holding States from discriminating taxation by a majority, citizens of other States, without interest in slaves, the apportionment clause was inserted, and it stands in the Constitution as a permanent bar to any exercise by Congress of the power of taxation which shall operate on property or its ownership directly as such, as distinguished from its enjoyment or consumption.

An attempt to express any authoritative rule limiting direct taxes to capitation taxes and land taxes is not warranted by the language of the distinguished judges whose casual expressions have been made the basis for the subsequent expressions. In *Hylton's* case the language of Mr. Justice Chase is:—

"I am inclined to think, *but of this I do not give a judicial opinion*, that the direct taxes contemplated by the Constitution are only two, to wit, a capitation, or poll tax, simply without regard to property, profession, or any other circumstance; and a tax on land. I doubt whether a tax, by a general assessment of personal property within the United States, is included within the term direct tax."

The question upon which Mr. Justice Chase did express a judicial opinion was this:—

"That an annual tax on carriages for the conveyance of persons may be considered within the power granted to Congress to lay duties. * * *

"It seems to me that a tax on expense is an indirect tax; and, I think, an annual tax on a carriage for the conveyance of persons is of that kind; *because a carriage is a consumable commodity, and such annual tax on it is on the expense of the owner.*"

The decision in *Hylton's* case we do not question. We rely on the point judicially decided as a foundation in our argument. To ask the court now to express a judicial opinion in the line of the definition given by Alexander Hamilton is not suggesting to the court new or novel doctrine, and if Hamilton's definition commends itself to the judgment of the court, it can be accepted, notwith-

standing that Mr. Justice Chase had doubts upon questions concerning which he declared he was not then called upon to give a judicial opinion.

Mr. Justice Patterson, delivering an opinion in the same case, shows that whatever doubt was in his mind was not on the side of the question expressed by Mr. Justice Chase. He says:—

“Whether direct taxes, in the sense of the Constitution, comprehend any other than a capitation tax and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States of the Union, then perhaps the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears, by the practice of some of the States, to have been considered as a direct tax. Whether it be so under the Constitution of the United States is a matter of some difficulty; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt the principal, *I will not say the only*, objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land.”

Mr. Justice Iredell, in closing his opinion, said:—

“There is no necessity or propriety in determining what is or is not a direct or indirect tax in all cases.

“Some difficulties may occur which we do not at present foresee. Perhaps a direct tax, in the sense of the Constitution, can mean nothing but a tax on something inseparably annexed to the soil; something capable of apportionment under all such circumstances.

“A land or a poll tax may be considered of this description.

“The latter is to be considered so particularly, under the present Constitution, on account of the slaves in the Southern States, who give a ratio in the representation in the proportion of three to five.

“Either of these is capable of apportionment.

“In regard to the articles, there may possibly be considerable doubt.

“It is sufficient, on the present occasion, for the court to be satisfied that this is not a direct tax contemplated by the Constitution, in order to affirm the present judgment; since, if it cannot be apportioned, it must necessarily be uniform.”

As *Hylton's* case is the great authority upon which all subsequent reasoning as to the true construction of this clause of the Constitution has been based, we are justified in asserting that there is nothing to limit the phrase "direct" taxes to taxes upon land or poll taxes, either in the judgment rendered or in those portions of the opinions in which the judges undertake to make an authoritative statement of their judicial conclusions.

There was no further judicial construction of this clause until 1868; Mr. Hamilton's definition, therefore, may be accepted as a reasonable guide, unimpaired by anything to qualify or limit its application as broadly as he would have applied it.

The next case in which the clause was construed was the *Pacific Insurance Company vs. Soule*, 7 Wallace, 433. That case was heard on certificate of division from the Circuit Court for California. The question certified was whether a tax under the Internal Revenue Act of 1864, paid by the Pacific Insurance Company, a corporation engaged in the business of insurance, upon its dividends and income, was a direct tax within the meaning of the Constitution. The opinion of Mr. Justice Swayne upon the question is brief. After quoting the constitutional provisions, he briefly recites some of the extracts from *Hylton's* case, heretofore quoted, and after noticing that the doctrine of *Hylton's* case had the support of Chancellor Kent and Justice Story in their commentaries, he says:—

"Duties are defined by Tomlin to be things due and recoverable by law. The term, in its widest signification, is hardly less comprehensive than 'taxes.' It is applied, in its most restricted meaning, to customs; and in that sense is nearly the synonym of 'imposts.'"

"Imposts is a duty on imported goods and merchandise. In a larger sense, it is any tax or imposition. Cowell says it is distinguished from custom, 'because custom is rather the profit which the price makes on goods shipped out.' Mr. Madison considered the term 'duties' and 'imposts' in these clauses as synonymous. Judge Tucker thought 'they were probably intended to comprehend every species of tax or contribution not included under the ordinary terms, 'taxes and excises.'"

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor.

"The taxing power is given in the most comprehensive terms. The only limitations imposed are: That direct taxes, including the capitation tax, shall be apportioned; that duties, imposts, and excises shall be uniform; and that no duties shall be imposed upon articles exported from any State. With these exceptions, the exercise of the power is, in all respects, unfettered.

"If a tax upon carriages, kept for his own use by the owner, is not a direct tax, we can see no ground upon which the tax upon the business of an insurance company can be held to belong to that class of revenue charges."

It will be perceived that the judgment of the court rested on the same ground as the judgment in the *Hylton* case, that the tax imposed was not a tax on property, as such, in a general sense. The tax upon carriages, in the language of Justice Chase, was a tax on "a consumable commodity and on the expense of the owner," so the tax on dividends and earnings was sustained as a tax upon the business which brought it, as an excise within the same class of revenue charges. There is nothing, therefore, in this case or in the opinion of Mr. Justice Swayne to qualify Mr. Hamilton's definition.

In the following year (1869), *Veazie Bank v. Fenno*, 8 Wallace, 533, was decided. The tax there considered was that imposed under the Revenue Act of 1866 of ten per centum upon the circulating notes of State banks. One question determined was that this was not a tax which impaired the franchise derived by the several banks from the States granting their several charters. The other question determined was that it was not a direct tax. Although the case was argued for the banks by very distinguished counsel—Messrs. Reverdy Johnson and Caleb Cushing—it is difficult to see how even their great abilities could evolve an argument in support of their contention, and the report of their argument throws no light upon the grounds on which they undertook to support their

position. The whole report of the argument is as follows:—

“That the tax in question was a direct tax, and that it had not been apportioned among the States agreeably to the Constitution.

“In explanation of the nature of direct taxes they relied largely upon the writings of Adam Smith, and upon other treatises, English and American, of political economy.”

While two of the justices dissented from the judgment of the court upon the ground that the tax was invalid as a taxation of the powers and faculties of the State government essential to State sovereignty, the judgment of the court appears to have been unanimous that the tax was an indirect, and not a direct, tax, subject to the constitutional duty of apportionment between the States. This judgment of the court does not involve any principle which is in conflict with the definition of a direct tax as stated by Mr. Hamilton. It is true that in the opinion of Mr. Chief Justice Chase, after a historical reference to the statutes under which direct taxation had been imposed in 1798, 1813, and 1816 on lands, improvements, dwelling houses, and slaves, and in 1861 on lands, improvements, and dwelling houses only, he states:—

“This review shows that personal property, contracts, occupations and the like have never been regarded by Congress as proper subjects of direct tax.”

This is undoubtedly a correct statement of an historical fact, but it does not tend to show, nor could the inference be drawn therefrom, that the failure of Congress theretofore to impose a direct tax on personal property broadly binds the Supreme Court to any particular determination upon the question whether a tax so imposed is or is not a direct tax. The question remained, as it had theretofore been, an undetermined question, upon which it would become the duty of the court to express an opinion when it was properly raised upon some record duly brought before them.

In *Pollock vs. Farmers' Loan and Trust Company*, 158

U. S., 629. Mr. Chief Justice Fuller points out the full effect which should be given to the argument based upon the absence of Congressional legislation:—

“Nor are we impressed with the contention that, because in the four instances in which the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it. We should regret to be compelled to hold the powers of the general Government thus restricted, and certainly cannot accede to the idea that the Constitution has become weakened by a particular course of inaction under it.”

We have already referred to *Scholey v. Rew*, 23 Wallace, 331, pointing out that the tax there under consideration was distinctly not a tax on property, but a tax on the right of succession, and as such distinguishable from the present case. After referring to the provisions of the statute, Mr. Justice Clifford said:—

“Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the preceding section, which provides that the term succession shall denote the devolution of real estate; and the section which imposes the tax or duty also contains a corresponding clause which provides that the term successor shall denote the person so entitled, and that the term predecessor shall denote the grantor, testator, ancestor, or other person from whom the interest of the successors has been or shall be derived.

“Successor is employed in the Act as the correlative to predecessor, and the succession or devolution of the real estate is the subject matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed, or laws of descent, from a grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived.”

This construction of the statute under consideration indicates that the ground of the decision was, the tax was an excise upon a devolution of title; that the court did not then undertake to establish any rule which would

limit Mr. Hamilton's definition is found from the succeeding paragraphs in the opinion:—

"Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax, such as the one involved in the present controversy."

Scholey *vs.* Rew is a case which, upon a casual reading, might appear to be an authority in favor of the validity of the present tax. It is proper, therefore, to re-iterate the distinctions already referred to.

(a.) Scholey *vs.* Rew arose under the clauses of the Act of 1864, imposing a tax on the devolution of the title to real estate. The language of the clause, already quoted at length on page 11 of this brief, is clear. The tax is not upon property, but upon the "succession" to real estate.

"There shall be levied and paid to the United States in respect to every such *succession* as aforesaid, according to the value thereof, duties. * * *"

And in the preceding paragraph of the statute a "succession" was defined to be—

"A disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate or the income thereof upon the death of any person, * * *"

The subject matter of the tax, therefore, was not property, but the devolution of title to property—as much a legitimate subject of an excise as a transfer of title to real estate by deed *inter vivos*. Scholey *vs.* Rew is therefore a different case from the present.

(b.) The clauses of the Act of 1864, by which a tax was imposed upon personal estates of decedents passing in legacies or distributive shares, was never the subject of consideration by the Supreme Court.

We could admit that the tax imposed by these clauses in the Act of 1864 was also an excise, because the sum payable was measured by the amount of the legacy or distributive share received. As between persons in the same degree of consanguinity, the rate payable was a uniform rate per dollar of the amount received by such legatee or distributee. It could have been reasonably said, therefore, that the tax was not imposed upon the property of a decedent, but upon the act of taking a legacy or distributive share.

No such construction can be given to the Act of 1898. The tax is not measured by the amount of the legacy received, but by the total net amount of the decedent's estate. The illustration on page 12 of this brief shows that in the distribution of an estate as between children, it is not the amount received by each child which determines the tax, but the total amount passing to all distributees. It is clear, therefore, that the subject matter upon which the tax operates is the net amount of a decedent's estate.

The introduction of the graduated scale found in section 29 of the Act of 1898 not only gives ground for contesting the constitutionality of the tax for lack of uniformity, which we will discuss further on in the brief, but essentially changes the character of the tax. Under the Act of 1864 the tax was severable as against each legatee or distributee, and measured strictly by the amount of each legacy or distributive share. Under the Act of 1898 the amount of each legacy or distributive share is immaterial, the tax is scaled by the total amount of the estate.

For these reasons we submit *Scholey vs. Rew* is not a guiding authority in the present case.

In the case of *Springer vs. United States*, 102 U. S., 586, already quoted, the question determined was that a tax imposed upon income generally was an excise, and not a direct tax on property, and it is in that case that the definition of Mr. Hamilton is quoted with approbation as a guide to the judgment of the court.

The remaining case in which the court has been called upon to consider the provisions is the comparatively recent

case of *Pollock vs. Farmers' Loan and Trust Co.*, 157 U. S., 429; 758 U. S., 601. We have already intimated that the difficulties which surrounded the determination of the question involved in that case do not arise here.

If the distinction between direct taxes and indirect taxes clearly stated in the question put to counsel by Mr. Justice Brown during the argument, 157 U. S., 491:—

“Is not the distinction somewhat like thus: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else?”

is applied to the present case, all difficulties are removed.

So in the opinion of Chief Justice Fuller, 157 U. S., 558, the following definition of direct tax is given as *prima facie* correct:—

“Ordinarily, all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect to their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes.”

Again, in the same opinion, at page 582:—

“Nothing can be clearer than that what the Constitution intended to guard against was the exercise by the general Government of the power of directly taxing persons and property within any State through a majority made up from the other States. It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population, is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers.

“It is not doubted that property owners ought to contribute in just measure to the expenses of the Government. As to the States and their municipalities, this is reached largely through the imposition of direct taxes. As to the Federal Government,

it is attained in part through excises and indirect taxes upon luxuries and consumption generally, to which direct taxation may be added to the extent the rule of apportionment allows. And through one mode or the other, the entire wealth of the country, real and personal, may be made, as it should be, to contribute to the common defense and general welfare.

"But the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible, and secured the creation of that dual form of government, so elastic and so strong, which has thus far survived in unabated vigor. If, by calling a tax indirect when it is essentially direct, the rule of protection could be fritted away, one of the great landmarks defining the boundary between the Nation and the States of which it is composed would have disappeared, and with it one of the bulwarks of private rights and private property."

So in the opinion of Mr. Justice Field, 157 U. S., 588:—

"Direct taxes, in a general and larger sense, may be described as taxes derived immediately from the person, or from real or personal property, without any recourse therefrom to other sources for reimbursement."

So also in the opinion of Mr. Chief Justice Fuller, after the rehearing of the case last cited, 158 U. S., 621:—

"The founders anticipated that the expenditures of the States, their counties, cities, and towns would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal Government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the General Government should not be exercised, except on necessity; and when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminately, as to particular States or otherwise, by a mere majority vote possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made. * * *

"Cooley (on Taxation, page 3) says that the word 'duty' ordinarily 'means an indirect tax imposed on the importation, exportation, or consumption of goods,' having 'a broader meaning than custom, which is a duty imposed on imports or exports;' that 'that the term imports also signifies any tax, tribute, or duty, but it is seldom applied to any but the indirect taxes. An excise duty is an inland impost levied upon articles of

manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities.'

"In the Constitution, the words 'duties, imposts, and excises' are put in antithesis to direct taxes."

In this opinion, also, recognition is given to Mr. Hamilton's definition, and the accuracy of the definition is vindicated at large in the following language (pages 624, 625):—

"Where did Mr. Hamilton stand? At that time he was Secretary of the Treasury, and it may therefore be assumed, without proof, that he favored the legislation. But upon what ground? He must, of course, have come to the conclusion that it was not a direct tax. Did he agree with Fisher Ames, his personal and political friend, that the tax was an excise? The evidence is overwhelming that he did.

"In the thirtieth number of the *Federalist*, after depicting the helpless and hopeless condition of the country growing out of the inability of the confederation to obtain from the States the moneys assigned to its expenses, he says: 'The more intelligent adversaries of the new Constitution admit the force of this reasoning; but they qualify their admission by a distinction between what they call internal and external taxation. The former they would reserve to the State Government; the latter, which they explain into commercial imposts, or rather duties on imported articles, they declare themselves willing to concede to the Federal head.' In the thirty-sixth number, while still adopting the division of his opponents, he says: 'The taxes intended to be comprised under the general denomination of internal taxes may be subdivided into those of the direct and those of the indirect kind. * * * As to the latter, by which must be understood duties and excises on articles of consumption, one is at a loss to conceive what can be the nature of the difficulties apprehended.' Thus we find Mr. Hamilton, while writing to induce the adoption of the Constitution, first, dividing the power of taxation into external and internal, putting into the former the power of imposing duties on imported articles, and into the latter all remaining powers; and, second, dividing the latter into direct and indirect, putting into the latter duties and excises on articles of consumption.

"It seems to us to inevitably follow that in Mr. Hamilton's judgment at that time, all internal taxes, except duties and excises on articles of consumption, fell into the category of direct taxes.

"Did he, in supporting the carriage tax bill, change his

views in this respect? His argument in the *Hylton* case in support of the law enables us to answer this question. It was not reported by Dallas, but was published in 1851 by his son in the edition of all Hamilton's writings except the *Federalist*. After saying that we shall seek in vain for any legal meaning of the respective terms 'direct and indirect taxes,' and after forcibly stating the impossibility of collecting the tax if it is to be considered as a direct tax, he says, doubtingly: 'The following are presumed to be the only direct taxes: capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on their whole real or personal estate; all else must of necessity be considered as indirect taxes.' 'Duties, imposts, and excises appear to be contradistinguished from taxes.' 'If the meaning of the word excise is to be sought in the British statute, it will be found to include the duty on carriages, which is there considered as an excise.' 'Where so important a distinction in the Constitution is to be realized, it is fair to seek the meaning of terms in the statutory language of that country from which our jurisprudence is derived.' 7 Hamilton's Works, 848. Mr. Hamilton therefore clearly supported the law which Mr. Madison opposed, for the same reason that his friend Fisher Ames did, because it was an excise, and as such was specifically comprehended by the Constitution. Any loose expressions in definition of the word 'direct,' so far as conflicting with his well-considered views in the *Federalist*, must be regarded as the liberty which the advocate usually thinks himself entitled to take with his subject."

The recent opinion of the court in *Nicol vs. Ames*, 173 U. S., 509, in which the provisions of this Act of Congress providing for a stamp tax upon certain commercial transactions were sustained as an excise, and not a direct tax, are in entire harmony with the views which have been expressed in this brief.

Mr. Justice Peckham, at page 515, says:—

"This necessary authority is given to Congress by the Constitution. It has power from that instrument to lay and collect taxes, duties, imposts, and excises, in order to pay the debts and provide for the common defense and general welfare, and the only constitutional restraint upon the power is that all duties, imposts, and excises shall be uniform throughout the United States, and that no capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration directed to be taken, and no tax or duty can be laid on articles exported from any State. (Constitution, article I., section 8 and

section 9, subdivisions 4 and 5.) As thus guarded, the whole power of taxation rests with Congress.

"The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. * * *

"Taxation is eminently practical, and is in fact brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy."

"In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of transaction. * * *

"We will now examine the several objections that have been offered to this statute.

"It may be stated, of course, that if the tax herein is a direct tax within the meaning of the Constitution, it is void, for there is no apportionment as required by that instrument.

"It is asserted to be a direct tax, because it is a tax upon the sale of property measured by the value of the thing sold, and such a tax is a direct tax upon the property itself, and therefore subject to the rule of apportionment. Various cases are cited, from *Brown v. Maryland*, 12 Wheat., 419, down to those involving the validity of the income tax, 157 U. S., 429; 158 U. S., 601, for the purpose of proving the correctness of this proposition. All the cases involved the question whether the taxes to which objection was taken amounted practically to a tax on the property. If this tax is not on the property, or on the sale thereof, then these cases do not apply.

"We think the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the Act. It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon membership therein,

nor is it a tax upon sales generally. The Act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. Whether this facility or privilege is such a thing as can be legally taxed, while leaving untaxed all other sales made outside of such places, will be discussed further on. At present it is enough to say that the tax is not upon the property sold, and cannot on that ground be found to be direct. The tax laid in the same Act upon a broker's note or memorandum of sale is a separate tax, although it may have reference to the same transaction. It is a tax on the note or memorandum itself where made by a broker, while in the other case the tax, although measured in amount by reference to the value of the thing sold, is in reality upon the privilege or facility used in the transaction or sale. The tax is not a direct tax within the meaning of the Constitution, but is, as already stated, in the nature of a duty or an excise. The amount of such a tax when imposed in a case like this may be increased or diminished by the extent to which the privilege or facility is used, and it is measured in this Act by the value of the property transferred by means of using such privilege or facility, but this does not make the tax a direct one. A tax on professional receipts was recognized by the present chief justice in delivering the opinion of the court on the first hearing of the Income Tax case, 157 U. S., 429, 579, as an excise or duty, and therefore indirect, while on the income of personalty he thought might be regarded as direct. And upon the rehearing, 158 U. S., 601, it was distinctly held that the tax on personal property or on the income thereof was a direct tax. This tax is neither a tax on the personal property sold nor upon the income thereof, although its amount is measured by the value of the property that is sold at the exchange or board of trade."

While the judgment of the court in the case just cited was that the stamp tax in transactions in the mercantile exchanges was an indirect tax or excise, and therefore not necessarily a precedent for the determination of the present case, the opinion is most valuable as a clear statement of the line of demarcation between direct and indirect taxes, and its reasoning justifies counsel in urging the argument hereinbefore presented.

Upon this branch of the argument we therefore respectfully submit, in conclusion, that the tax in question is a di-

rect tax on property, and as such must be apportioned among the several States in proportion to the population shown by the last census. The statute in which Congress attempted to impose the tax contains no recognition of the constitutional requirement of apportionment, and hence was not a valid exercise of the Federal taxing power.

FOURTH.

Assuming, however, that the tax imposed by the Internal Revenue Act of 1898 is not a direct tax, but comes within the class of duties, imposts, or excises, then does it conform to the rule of uniformity prescribed by the Federal Constitution, article I., section 8, clause 1:—

“ALL DUTIES, IMPOSTS, AND EXCISES SHALL BE UNIFORM THROUGHOUT THE UNITED STATES”?

FIFTH.

It has been suggested that full effect is given to this constitutional provision if there be no direct discrimination as between the several States in the Federal statute imposing or levying duties, imports, and excises.

We respectfully urge that any such limited interpretation of this clause of the Constitution loses sight of the fact that this constitutional provision was declaratory of a fundamental principle of taxation which has found expression in the several Constitutions of nearly every State of the Union.

ALABAMA.—“All taxes levied on property in this State shall be assessed in exact proportion to the value of such property.”

ARKANSAS.—“All property shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State.”

CALIFORNIA.—“All laws of a general nature shall have a uniform operation. * * * All property in the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law.”

COLORADO.—“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”

FLORIDA.—“The legislature shall provide for a uniform and equal rate of taxation, and shall prescribe such regulations as shall secure a just valuation of all property.”

GEORGIA.—“All taxation shall be uniform upon the same class of subjects and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax.”

IDAHO.—“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”

ILLINOIS.—“The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property, * * * in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. * * * All municipal corporations may be vested with authority to assess and collect taxes; but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same.”

INDIANA.—“The General Assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real

and personal, excepting * * * as may be especially exempted by law."

KANSAS.—"The legislature shall provide for a uniform and equal rate of assessment and taxation."

KENTUCKY.—"Taxes * * * shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax."

LOUISIANA.—"Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and all property shall be taxed in proportion to its value, to be ascertained as described by law. * * * In order to arrive at this equality and uniformity the General Assembly shall provide a system of equality and uniformity in assessments, based upon the relative value of property in the different portions of the State."

MAINE.—"All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof."

MARYLAND.—(Bill of Rights.) "Every person in the State, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property."

MICHIGAN.—"The legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law."

MINNESOTA.—"All taxes to be raised in the State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State."

MISSISSIPPI.—“Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.”

MISSOURI.—“Taxes * * * shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws. All property subject to taxation shall be taxed in proportion to its value.”

MONTANA.—“The legislative assembly shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property except that specially provided for.”

NEBRASKA.—“The legislature shall provide such revenues as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct * * * by general law, uniform as to the class upon which it operates.”

NEVADA.—“The legislature shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessary, excepting,” &c.

NEW HAMPSHIRE.—The legislature is given power “to impose and levy proportional and reasonable assessments, rates, and taxes upon all inhabitants of, and residents within, the said State, and upon the estates within the same.”

NEW JERSEY.—“Property shall be assessed for taxes under general laws and by uniform rules, according to its true value.”

NORTH CAROLINA.—“Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money.”

NORTH DAKOTA.—“Laws shall be passed taxing by uniform rule all property according to its true value in money.”

OHIO.—“Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money.”

OREGON.—“The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property.”

PENNSYLVANIA.—“All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”

RHODE ISLAND.—(Bill of Rights.) “The burdens of the State ought to be fairly distributed among its citizens.”

SOUTH CAROLINA.—“The general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessary, excepting.” &c.

SOUTH DAKOTA.—"All taxes to be raised in this State shall be uniform on all real and personal property, according to its value in money."

TENNESSEE.—"All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the State."

TEXAS.—"Taxation shall be equal and uniform. All property in this State * * * shall be taxed in proportion to its value, which shall be ascertained as may be provided by law. * * * All occupation taxes shall be equal and uniform upon the same class of subjects within the limits of the authority levying the tax."

VERMONT.—(Bill of Rights.) "Every member of society hath a right to be protected in the enjoyment of life, liberty, and property, and therefore is bound to contribute his proportion towards the expense of that protection."

VIRGINIA.—"Taxation * * * shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law."

WASHINGTON.—"All property in the State, not exempt * * * shall be taxed in proportion to its value, to be ascertained as provided by law. * * * The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the State, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property."

WEST VIRGINIA.—"Taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value."

WISCONSIN.—"The rule of taxation shall be uniform."

It has never been suggested that these constitutional provisions in the several States would be complied with, either in letter or in spirit, by tax legislation whose only claim to uniformity was that it did not discriminate between the several counties or townships of the State. The universality of this rule of uniformity in the several State Constitutions is conclusive that the express enactment is but declaratory of an underlying fundamental principle of taxation. The framers of the Federal Constitution announced it because they recognized the rule as fundamental and to emphasize it not only as a rule to be applied with reference to each district or State, but as a principle which was to be of force throughout the Union.

In this connection it may not be amiss to refer to the very clear statement found in the argument of Mr. Edmunds in the case of *Pollock vs. Farmers' Loan and Trust Company*, 157 U. S., 494. One common thought runs through all these enactments, both in Federal and State Constitutions. Taxation upon the same subject matter shall be uniform. Uniformity of tax upon the same subject matter was the primary thought. In view of the divergent and conflicting interests which might arise between the citizens of different States, the framers of the Federal Constitution added the further protection that this uniformity should extend throughout the United States, otherwise, upon the doctrine of classification which has been invoked, an excise might be charged against a taxable article in the State of Massachusetts but in no other State, and the claim be made that as the tax was uniform in operation upon all within the class taxed, to wit, all such articles within the State of Massachusetts, hence that the constitutional requirements of uniformity had not been violated.

In order, therefore, that taxes may be uniform in the sense prescribed by the Federal Constitution, the tax must be levied uniformly upon the same subject matter, and the uniformity must extend throughout the United States.

The cases which have been cited to prove that the only uniformity prescribed is geographical uniformity:—

Loughborough *vs.* Blake, 5 Wheaton, 317;

Head Money Case, 112 U. S., 580,
when examined, do not sustain that view.

Loughborough *vs.* Blake is a decision that the power of Congress to levy and collect taxes, duties, imposts, and excises is coextensive with the territory of the United States, including the District of Columbia, and that hence Congress had power to impose a direct tax on the District of Columbia in proportion to the census directed to be taken by the Constitution. There is absolutely nothing in the case or in the opinion of Mr. Chief Justice Marshall to justify the citation of this case as an authority for the proposition that the only uniformity prescribed by the Constitution is geographical uniformity, or, in other words, that the only possible violation of the constitutional rule of uniformity would be found in geographical discrimination.

In the Head Money case, the tax imposed by the Act of Congress upon the owners of steam or sailing vessels bringing passengers from a foreign port into the United States of fifty cents for every such passenger not a citizen of this country, was objected to upon the ground that it was a tax which did not operate uniformly throughout the United States, because there were many States into which it was impossible to bring steam or sailing vessels from foreign ports.

It was held that the mere fact that the subject matter of the tax did not exist in every State did not prevent it from being uniform within the meaning of the Constitution.

If this case is to be cited at all in the discussion of the present question it should be cited for the proposition that uniformity upon the subject matter is the essential requi-

site of constitutional uniformity, even though in some geographical districts the subject matter may not exist. The decision cannot possibly be distorted into supporting the proposition that so long as no geographical discrimination is made, uniformity as to subject matter is not requisite.

On the other hand, an examination of the opinions of the Supreme Court of the United States in which the constitutional requisite of "uniformity" has been referred to, shows that geographical "uniformity" is not all that is involved in the constitutional provisions.

In *Veazie Bank vs. Fenno*, 8 Wallace, 533, Mr. Chief Justice Chase, at page 546, after referring to the prior decisions of the court upon the subject of what taxes are included within the class of direct taxes, added:—

"It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are included under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity."

In *United States vs. Singer*, 15 Wallace, 111, Mr. Justice Field, in sustaining the excise on whisky levied in the Internal Revenue Act of 1868, said at page 121:—

"The law is not, in our judgment, subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be 'uniform throughout the United States.' The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In *Gilman vs. Sheboygan*, 2 Black, 510, Mr. Justice Swayne, in passing on the constitutionality of a statute of Wisconsin, in view of the provision of the Constitution of that State requiring taxation to be uniform, quoted with approval the decisions of the Supreme Court of that State in which uniformity throughout the State was thus defined:—

"Taxing is required to be by a uniform rule, that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as the rate of taxation. But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must extend to all property subject to taxation, so that all property must be taxed alike, equally, which is taxing by a uniform rule."

So in *Pine Grove vs. Talcott*, 19 Wallace, 666, the court, in construing the Constitution of the State of Michigan, which reads as follows:—

"The legislature shall provide a uniform rule of taxation, except as to property paying specific taxes,"

said:—

"The eleventh clause of the same article declares that the legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being classified, and taxed as classified, by different rules. All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be coextensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State; if a county or city tax, throughout such county or city."

That mere geographical uniformity was not intended is also shown in the lectures of Mr. Justice Miller on the Constitution, cited in the opinion of Mr. Justice Field, in *Pollock vs. Farmers' Loan & Trust Company*, 157 U. S., 594:—

"Mr. Justice Miller, in his lectures on the Constitution (N. Y., 1891), pages 240, 241, said of taxes levied by Congress: 'The tax must be uniform on the particular article; and it is uniform, within the meaning of the constitutional requirement, if it is made to bear the same percentage over all the United

States. That is manifestly the meaning of this word as used in this clause. The framers of the Constitution could not have meant to say that the Government, in raising its revenues, should not be allowed to discriminate between the articles which it should tax.' In discussing generally the requirements of uniformity found in the State Constitutions, he said: 'The difficulties in the way of this construction have, however, been very largely obviated by the meaning of the word "uniform" which has been adopted, holding that the uniformity must refer to articles of the same class. That is, different articles may be taxed at different amounts, provided the rate is uniform on the same class everywhere, with all people, and at all times.' "

SIXTH.

In urging the rule of uniformity, we are not unmindful that without infringing the rule of uniformity the legislative taxing power may divide the various subjects of taxation into different classes and impose upon each class such tax as the legislature may think right, and the power of classification is not necessarily limited to things of different names. Things of the same name belonging to the same genus may so vary one from the other as to be of different species, and as a separate species possess such characteristics as to justify a different rate of tax from that imposed upon other articles of the same genus, but having different qualities. But while recognizing to the fullest degree the power of legislative classification, we assert that such classification must always rest upon a rational foundation. An essential difference must exist between articles placed in separate classes, and a mere variance in the number of units, where such unit is the basis of taxation, does not justify classification based simply upon a difference in the number of units found in a common ownership. In the present case the unit for taxation is \$100. If that unit of \$100 is found in class one in company with not more than one hundred others, as shown in the table printed at page 4 of this brief, such unit, with all its associates, is exempt from taxation. If found in class two, the same unit, having no essential difference except the accidental difference of being found in company with other units, aggregating a sum from \$10,000 to \$25,000—that is, when there are from

100 to 250 of such units in a common ownership—the tax is at seventy-five cents for each unit. In the third class the same unit, with the accidental and not essential difference that it is found in company with other units of the same class, aggregating from 250 to 1000, is taxed at a still higher rate, and so on through the six classes. There is no essential difference in each unit of \$100, whether it stand by itself or be found in company with other sums of \$100, which renders such accidental difference the basis of rational classification for purposes of taxation.

Upon this point we are enlightened by the opinion of Mr. Justice Bradley, in *Bell's Gap R. R. Co. v. Pennsylvania*, 134 U. S., 232. At page 237, in stating the limitations upon the power of taxation, he says:—

"It (the legislature) may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excises upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our Governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise."

That legislation may be declared invalid by the courts as an unreasonable and unwarrantable exercise of the legislative power of classification is shown in the opinion of Mr. Justice Harlan, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U. S., at page 674:—

"If it were true that this legislation, in its important aspects and in its essence, discriminated against the rich because of

their wealth, the court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of taxation, but was repugnant to those principles of natural right upon which our free institutions rest, and, therefore, was legislative spoliation, under the guise of taxation."

The rule of equality was clearly stated in the same opinion, at page 676:—

"I may say, in answer to the appeals made to this court to vindicate the constitutional rights of citizens owning large properties and having large incomes, that the real friends of property are not those who would exempt the wealth of the country from bearing its fair share of the burdens of taxation, but rather those who seek to have every one, without reference to his locality, contribute from his substance, upon terms of equality with all others, to the support of the Government.

And again, at page 690:—

"I am of opinion * * * that the Government of the Union, in order to pay its debts and provide for the common defense and the general welfare, and under its power to levy and collect taxes, duties, imposts, and excises, may reach, under the rule of uniformity, all property and property rights in whatever State they may be found."

That uniformity upon all of the same class is a binding rule of valid taxation, even irrespective of constitutional provision, is expressed in the opinion of Mr. Justice Brown, in the same case, at page 693, where he says:—

"Irrespective, however, of the Constitution, a tax which is wanting in uniformity among members of the same class is or may be invalid."

The limits upon the power of classification have been very clearly stated in several cases which have arisen in the Supreme Court of Pennsylvania. In *Wheeler vs. The City of Philadelphia*, 77 Pa. St., 338, in which it was held that a classification of municipal corporations as to matters of municipal government in accordance with population was rational classification, and hence was not special legislation violating the constitutional requirements of uniformity:—

"For the purpose of taxation, real estate may be classified. Thus timber lands, arable lands, mineral lands, urban and rural, may be divided into distinct classes, and subjected to different rates. In like manner other subjects, trades, occupations, and professions may be classified. And not only things, but persons may be divided. The *genus homo* is a subject within the meaning of the Constitution. Will it be contended that as to this there can be no classification? No laws affecting the personal and property rights of minors, as distinguished from adults, or of males distinguished from females, or in the case of the latter, no distinction between a *femme covert* and a single woman? What becomes of all our legislation in regard to the rights of married women if there can be no classification, and where is the power to provide for any future safeguards for their separate estate? These illustrations might be multiplied indefinitely were it necessary."

This opinion illustrates that which has already been pointed out, that even among things having the same name, to wit, cities, there may be such differences as to make a city of one population a different entity or subject matter from a city of a different population, and as between persons belonging to the *genus homo*, a man may be properly classified as a distinct entity from a woman, and even as between women, that the class of *femmes covert* may be treated as a distinct entity and a separate class for legislation as distinguished from the class of single women. In the later cases the same court, with great clearness, has pointed out that classification must be based upon some rational ground with reference to the legislation enacted, and that accidental and collateral differences were not sufficient to justify mere arbitrary classification. The legislature for governmental purposes may classify cities in accordance with population, but it is upon the ground that larger cities need different governmental organization from smaller cities, as was said in Ruan Street, 132 Pa. St., 257:—

"Among the many subjects of legislation which classification presents, we may call attention to such as the establishment, maintenance, and control of an adequate police force for the public protection; the preservation of the public health; protection against fire; the provisions of an adequate water supply;

the paving, grading, curbing, and lighting of the public streets; the regulation of markets and market houses, of docks and wharves; the erection and care of public buildings, and other municipal improvements. These are mentioned, not because they include all the subjects for the exercise of municipal powers, but as a suggestion of some of the more obvious ones, and as an illustration of the character of the subjects upon which legislation for the classified cities may be necessary. These classes are thus seen to embrace not mere geographical subdivisions of the territory of the State, but organized municipalities, which are divided with reference to their own peculiar characteristics and needs; and the legislation to which they are entitled by virtue of such division is simply that which relates to the peculiarities and needs which induce the division. In this way each class may be provided with legislation appropriate to it, without imposing the same provisions on other classes to which they would be unsuitable and burdensome."

"We come now to inquire what legislation remains forbidden to cities, notwithstanding classification. I reply that legislation not relating to the exercise of corporate powers or to corporate officers and their powers and duties is unauthorized by classification."

Hence, a classification of cities upon the numerical population could not be taken as a basis for the classification of other subject matters of legislation depending upon the accident of location within a particular class of municipalities. In the case last cited it was held that it was not within the power of the legislature to affect the civil rights of a citizen by varying those rights because of the accident of his living within a municipality of a particular class.

"But a statute is not above the Constitution. The Classification Act is subject to the limits which article III., section 7, prescribe, and it cannot transcend a single one of them. For that reason the courts of law in Philadelphia have the same jurisdiction and powers, and proceed in the same manner, as the courts in the other counties of the Commonwealth. The system of practice, so far as it rests on statutory provisions, must be the same. The same proceedings are had on writs, the same method for securing the benefit of the exemption of property from levy and sale, the same writ of *habeas corpus* for one who is restrained of his liberty, the same proceeding for one whose land is entered upon and appropriated to public or to corporate uses. These are the civil rights of the citizens of Pennsylvania as such, and they are not affected by the size of

the town in which he lives or the value of his land, any more than by the color of his skin. They are the safeguards provided by the Constitution for the protection of the weak as well as the strong, the dweller in the country as well as the resident in 'cities of the first class,' and no system of classification of cities of other divisions of the State can disturb them."

And this line of reasoning led the same court to hold, in *Weinman v. Passenger Railroad*, 118 Pa. St., 192, there being a constitutional prohibition against special legislation affecting corporations, that it was not competent to classify street passenger railroads into various classes depending upon their location within cities of the first, second, or third classes, pointing out that the situation of a railroad company within a particular municipality was a mere accident, having no relationship to the governmental function of the municipality as such.

An illustration of the rule against irrational classification is found in *Commonwealth v. Patton*, 88 Pa. St., 258, where a certain Act of Assembly was by its terms applicable to all counties within the State of more than sixty thousand inhabitants, and in which there shall be any city incorporated at the time of the passage of the Act with a population exceeding eight thousand inhabitants, situate at a distance from the county seat of more than twenty-seven miles, by the usual traveled public road.

The court said:—

"This is classification run mad. Why not say all counties named Crawford, with a population exceeding sixty thousand, and containing a city called Titusville, with a population of eight thousand, and situated twenty-seven miles from the county seat? Or all counties with a population of over sixty thousand, water by a certain river, or bounded by a certain mountain."

It is hardly necessary to cite authorities to support propositions which so recently have had the unanimous approval of this court.

In the case of *Colorado Gulf & S. F. R. R. Co. v. Ellis*, 165 U. S., 150, the question was whether a statute of the State of Texas was constitutional, taxing a fifty dollar coun-

sel fee against railroad corporations unsuccessfully defending claims against them for cattle injured in the operation of their road. The statute was held invalid, the attempted classification being without reason in legal contemplation. The opinion of Mr. Justice Brewer contains an exhaustive review of authorities from many States, and also a clear definition of the limits of classification. He says:—

"Yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

"* * * The difference which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land.

"* * * No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo vs. Hopkins*, 118 U. S., 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation of

such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government."

The recent case of *Nicol vs. Ames*, 173 U. S., 509, is also valuable in its clear definition of the principles to be applied in construing the constitutional requirements of uniformity. The court held that sales in commercial exchanges were sales in a class which might be segregated from all other sales and be made the subject of a tax applying to such sales and not to other sales. The distinguishing features of such sales having been pointed out, Mr. Justice Peckham proceeds (page 521):—

"This general objection on the ground of want of uniformity is not, in our judgment, well founded. Whether the word 'uniform' is to be understood in what has been termed its 'geographical' sense, or as meaning uniformity as to all the taxpayers similarly situated with regard to the subject matter of the tax, we think this tax is valid within either meaning of the term. In our judgment, a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. * * * The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, Colorado, &c., Railway vs. Ellis*, 165 U. S., 150-155; *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S., 283, 294. If the classification be proper and legal, then there is the requisite uniformity in that respect.

"A tax upon the privilege of selling property at the exchange and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. Although not created by government, this privilege or facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places

are untaxed. A sale at an exchange differs from a sale made at a man's private office, or on his farm, or by a partnership, because, although the subject matter of the sale may be the same in each case, there are at an exchange certain advantages in the way of finding a market, obtaining a price, the saving of time, and in the security of payment, and other matters, which are more easily obtained there than at an office or upon a farm. To accomplish a sale at one's farm or house or office might and probably would occupy a great deal of time in finding a customer, bringing him to the spot, and agreeing on a price. All this can be done at an exchange in the very shortest time and at the least inconvenience. The market is there, and all that is necessary is to send the commodity. Although a sale is the result in each case and the thing sold may be of the same kind, the difference exists in the means and facilities for accomplishing such sale, and those means and facilities there is no reason for saying may not be taxed, unless all sales are taxed, whether the facilities be used or not.

"In this case there is that uniformity which the Constitution requires. The tax or duty is uniform throughout the United States, and it is uniform, or, in other words, equal, upon all who avail themselves of the privileges or facilities offered at the exchanges, and it is not necessary in order to be uniform that the tax should be levied upon all who make sales of the same kind of things, whether at an exchange or elsewhere."

The language of the court fully justifies the action of Congress in selecting sales at commercial exchanges as an integral class for taxation and the imposition of a tax proportionate to the sales. But, however, the Act of Congress had imposed a tax upon all sales at commercial exchanges, and measured the tax, not upon a scale simply proportionate to the sale, but in an ascending scale to be increased as the capital in business of the seller or dealer increases, taxing sales by dealers whose capital exceeds \$100,000 three times the rate of sales by dealers whose capital was between \$10,000 and \$25,000, then we would have a question of uniformity in taxation analogous to the question now before the court in the succession tax. This court never has decided that such taxation is uniform within the meaning of the Constitution, and we respectfully ask that it will not now so decide.

From this review we feel justified in asserting that the

constitutional provision, when properly understood, imports that Federal taxation shall be uniform throughout the United States upon the same subject matter, and classification must rest upon a rational foundation, and cannot be made a cover under which to evade the rule of uniformity.

The principles of law upon which we rely are not open to dispute. The critical question before the court is the classification of estates for taxation by a graduated scale increasing the proportionate rate of tax as the amount of the subject of taxation passes from one class into a higher class, based upon such a rational distinction as to be a valid exercise of the legislative power.

We have already pointed out that the unit of taxation fixed by the statute is the sum of \$100, and that the increased rate running through the six classes does not depend on any difference in the unit taxed, but upon the accident of these units being associated in a common ownership with other units to a specified aggregate amount. No justification for this attempt at classification has ever been presented based upon any reason which is connected with the subject taxed. The justification which has been asserted is entirely outside of the subject taxed. It is claimed that one receiving by inheritance or will a legacy of larger amount can bear the burden of taxation at a higher rate with less inconvenience than one who received a small legacy, but we have already pointed out that this attempted justification does not meet the case presented by the statute.

The tax is not imposed upon the amount of the legacy received. An only child inheriting an entire estate of \$20,000 is charged with a tax at the rate of seventy-five cents on the hundred dollars, while a child receiving a legacy of \$20,000 from a parent who divided \$200,000 among ten children would have to pay at the rate of one dollar and fifty cents per hundred dollars. The statute does not purport to tax the receiving of the legacy, but taxes the estate for distribution in the hands of the executor. The comparative ability of the legatee to pay

cannot therefore be urged as a justification for the distinction in rate.

But passing this line of argument, which is in the nature of a criticism of the provisions of this particular statute, we stand upon the broader ground that it is a violation of the fundamental principle of uniformity to classify property for taxation upon the theory that large property interests or persons of larger means can make their contribution to the public treasury with less inconvenience, and therefore should be called upon to contribute at a higher rate per dollar than persons possessed of less means. If such grading for taxation be not in violation of the constitutional requirement of uniformity, then it is competent for the taxing power to grade farms, dwelling houses, and all forms of property into six classes, or as many more as the taxing power may deem expedient, and exempt from taxation all farms and dwelling houses not exceeding \$10,000 in value, and by a graduated scale impose the entire burden of maintaining the Government upon such property, the value of which exceed \$10,000, in a common ownership. The illustration just given expresses a more common instance of taxation than an excise on inheritances or legacies. But we have already shown that this excise or duty, if it is to be sustained, is to be sustained solely as an exercise of the taxing power, and not of the legislative power, to regulate the disposition of estates by will or the distribution of the property of intestates. If the Federal taxing power can tax legacies by a graded tax, the State taxing power, although limited by like constitutional requirements of uniformity in taxation, may grade for taxation farms and dwelling houses and every other taxable commodity.

Such grading for taxation introduces distinctions for taxation which have heretofore been absent from the American theory of government. By statutory enactment the community would be divided into six classes, with degrees of wealth as the distinguishing feature.

By far the most numerous class—in number many times exceeding the aggregate of all the other classes—to wit,

those not possessed of personal property exceeding \$10,000—would be relieved from all responsibility of contributing towards the expenses of the State—the small minority divided into five classes with increasing rates as they ascend in the scale of wealth.

Those opposing graduated taxation have sometimes expressed the fear that the system would be destructive to accumulated wealth; that a majority of the populace would control legislation so as to effect through excessive legislation a redistribution of the estates of the rich, and thereby relieve the body of the people of any share in the burden of supporting the Government.

We are not moved by any such fear. History justifies the belief that in all such conflicts the rich have proved well able to protect their own interests, but we do urge the court to declare that such graduated taxation is destructive of the fundamental principles of equality before the law, which knows no man as rich or poor, but all as equal.

We ask this court to announce in unmistakable language that the doctrine of equality before the law is to be preserved, not through any fear of the effect of the statute upon the estates of the rich, but because the permanence of republican institutions depends upon the obliteration before the law of all classification dependent merely upon considerations of wealth.

The nation has grown to its present wealth and prosperity through the energy and independent character of its free people. Every boy, even though his only inheritance was integrity of character and a good name, knew that before the law he was the equal of the most favored son of fortune—an equality, not only of opportunity, but an equality of duty and responsibility.

If the great body of the American people should be relieved of the duty of doing their share in supporting the State according to their means upon some mistaken theory of taxation that the rich can better afford to be heavily taxed than the poor to be taxed at all, the qualities which have heretofore been the distinguishing marks of American

freemen will no longer characterize our people. The great body will be a proletariat, relieved of the responsibility of supporting the State, and consequently lost to that sense of responsibility towards the State, without which government by the people cannot be maintained.

No more fatal blow could be given to popular government than the incorporation into the body of our legislation of this principle of graduated taxation. We do not charge that the author or the defenders of this legislation have any conscious purpose of undermining our free institutions, but with all the seriousness which the gravity of the subject demands, we assert that the general establishment of any such system of taxation would be to place the control of the Government in the hands of the "taxed" class. If the body of American voters come to feel that they have no duty to support the State, they will exercise the right of suffrage in *forma pauperis*, and be the willing vassals and adherents of the rich and successful, who will have new and cogent reasons for maintaining control of public affairs.

No more certain way of establishing an American plutocracy as the successor of the American democracy could be suggested than by legislation and judicial judgment to recognize a division of the community into the six classes according to the scale of wealth prescribed in the statute. Unless all the lessons of history are read in vain, the classes distinguished by the burden of supporting the public treasury would soon become the masters of the masses thus declared unworthy of the honors of citizenship. The duty of supporting the State is as honorable a privilege as the right of suffrage. He who through weakness or incapacity accepts the benefit of a legal declaration that he owes the State no duty of support withdraws himself from the class worthy to exercise the privileges of American citizenship. Those willing to be enumerated in such a class would be worthy the place of serfs. The five statutory classes charged with the duty of supporting the State could fairly claim to be an American aristocracy, for by Act of Congress they alone have been declared worthy of supporting the Republic.

The views which we have here endeavored to express have been formulated by Mr. Justice Field, 157 U. S., 586:—

"Under wise and constitutional legislation every citizen should contribute his proportion, however small the sum, to the support of the Government, and it is no kindness to urge any of our citizens to escape from that obligation. If he contributes the smallest mite of his earnings to that purpose he will have a greater regard for the Government and more self-respect for himself, feeling that though he is poor in fact, he is not a pauper of his Government. And it is to be hoped that, whatever woes and embarrassments may betide our people, they may never lose their manliness and self-respect. Those qualities preserved, they will ultimately triumph over all reverses of fortune."

We do not ask the court to usurp the function of the legislature in determining the mere question of the policy of the statute. The objection is not to the policy of the statute, but fundamental, as in contravention of the elementary principles of American life.

SEVENTH.

An examination of the decisions of the several State courts in which the question of progressive inheritance tax has been considered shows that these cases may be divided into two classes:—

(a.) Those in which the court held that the duty imposed upon the succession was a tax. In these cases the constitutional requirement of uniformity was held to be binding, and statutes passed in disregard of the provision were held unconstitutional. Such have been the decisions of the Supreme Courts of Pennsylvania, Ohio, New Hampshire, Missouri, and Minnesota.

(b.) Those cases in which it was held that the amount which by statute became payable into the State Treasury was not a tax in the ordinary sense of taxation, but was the exercise by the legislature of its reserved power of control over the devolution of estates either upon intestacy or by will. In such cases, where the legislation was not regarded as an exercise of the taxing power, but as an exercise of

the legislative control over the devolution of the estate, the statute has been sustained. Such are the decisions in the courts of Illinois, Maine, Colorado, Montana, and Massachusetts.

It may therefore be instructive to mark this distinction.

The latest and one of the most satisfactory discussions of the subject is found in the opinion of Mr. Chief Justice Sterrett, of the Supreme Court of Pennsylvania, in Cope's Appeal, 191 Pa. St., 1. In the course of the opinion the following is found:—

"As to the character of the Act, there cannot be any doubt. That it is an Act imposing taxes on the personal property therein specified is too plain for discussion. To hold otherwise would be a perversion of the plain meaning of the words employed in entitling the Act and specifying its provisions. As we have seen, its title declares it to be 'An Act taxing gifts, legacies,' &c., and providing for the collection thereof. Section 16 declares that it shall be 'known as the Direct Inheritance Tax Law.' The 'personal property' specified in the Act is, in express words, 'made subject to the tax,' &c. (section 1). The second *proviso* to that section expressly declares 'that so much of the estates of persons heretofore deceased as has not been actually distributed and paid to persons entitled thereto prior to the passage of this Act shall be liable to the tax imposed by this law, as well as the estate of persons who die hereafter.' Section 5 declares: 'All taxes imposed by this Act shall be a lien upon the personal property of the estate on which the tax is imposed, or upon the proceeds arising from the sale of such property,' &c. It is also an Act exempting 'from the payment of this tax, in all estates,' personal property specified therein to the amount of \$5000.

"The Act in question has none of the features of an intestate law, or of an Act regulating the disposition of property by will or by instruments in the nature thereof. On the contrary, upon its face and in all its provisions it is manifestly a tax law, clearly and distinctly predicated of the actual existence and general operation of an intestate law and a will's Act, under the operation of one or other of which the personal property intended by its provisions to be subjected to taxation would pass from the then, as well as subsequent, owners thereof to others, or had theretofore passed and become vested in others prior to the date of the Act under consideration. * * *

"It is of the very essence of taxation that it should be relatively equal and uniform, and where the burden is common.

there should be a common contribution to discharge it: Cooley's *Constitutional Limitations*, *495. In his *Treatise on Taxation* (2d edition), pages 2, 3, the same learned author says: 'In an exercise of the power to tax, the purpose always is that a common burden shall be sustained by common contributions, regulated by some fixed general rule and apportioned by the law according to some uniform ratio of equality. The power is not, therefore, arbitrary, but rests on fixed principles of justice which have for their object the protection of the taxpayer against exceptional and invidious exactions, and is to have effect through established rules operating impartially.'

"Equality in the imposition of the burden is of the very essence of the right, and though absolute equality and absolute justice may not be attainable, the adoption of some rule tending to that end is indispensable. Equality as far as practicable and security of property against irresponsible power are principles which underlie the power of taxation as declared ends and principles of fundamental laws.' *Desty on Taxation*, 29, and cases there cited. * * *

"The language of section 1, as to what the rule of uniformity shall embrace, is as broad and comprehensive as it could possibly have been made. The words, 'all taxes,' must necessarily be construed to include property tax, inheritance tax, succession tax, and all other kinds of tax the subjects of which are susceptible of just and proper classification. By necessary implication, the first clause of that section recognizes the authority of the legislature to justly and fairly, but never arbitrarily, classify those subjects of taxation with the view of effecting relative equality of burdens. A pretended classification that is based solely on a difference in quantity of precisely the same kind of property is necessarily unjust, arbitrary, and illegal. For example, a division of personal property into three classes with the view of imposing a different tax rate on each, class 1 consisting of personal property exceeding in value the sum of \$100,000; class 2 consisting of personal property exceeding in value \$20,000 and not exceeding \$100,000; and class 3 consisting of personal property not exceeding in value \$20,000, would be so manifestly arbitrary and illegal that no one would attempt to justify it. * * *

"These propositions are predicated of the assumed principle that the right to inherit or succeed to property is not a natural but merely a civil right (1 *Sharswood's Blackstone*, 398 and 399), and hence the Commonwealth, acting through its law-making power, may assert its sovereign right to take and appropriate to its own use such portion or portions of the estates, real, personal, and mixed, of every decedent as the legislature,

in its wisdom, may consider necessary and proper. They also assume that the people of this State, in their fundamental law, have placed no restriction on legislative power in that regard.

"Without pausing to consider the soundness as well as the scope of the principle thus broadly asserted, but conceding, for argument's sake merely, that the legislature has the power under our Constitution to so change the law of descent and succession as to give the Commonwealth a certain portion of every decedent's estate, or to otherwise regulate the transmission or devolution of such estates, it does not by any means follow that the 'direct inheritance tax law' under consideration is such an Act. As we have seen, the Act does not profess to be a supplement to or an amendment of our laws relating to the estates of testates, but quite the reverse. There is nothing in its title or its text to indicate anything else than that it was intended to be a tax law imposing a tax of two per centum on the personal property of decedents therein specified within the scope of article IX. of the Constitution; but assuming, for argument's sake only, that it is otherwise—that it was in fact intended to be an Act supplementary or amendatory of existing laws regulating the succession to estate of decedents, we think it clearly offends against the clause of article III., section 7 of the Constitution, which declares: 'The General Assembly shall not pass any local or special law * * * changing the law of descent or succession.'"

So in *State v. Switzler*, 143 Mo., 287, the Missouri graduated inheritance tax of 1895 was held void upon the ground of the progressive feature of that Act, whereby estates under \$10,000 were taxed at one rate and estates over \$10,000 were taxed at an increased rate. Mr. Chief Justice Gantt delivered an opinion, in which was said:—

"No doubt longer exists that it is competent for the legislature to levy a tax upon the succession of estates. It is equally universally held that such a tax is not a tax upon property in the ordinary sense, but is in the nature of an excise or bonus enacted by the State upon the privilege or right to inherit or succeed to an estate. * * *

"The controlling question is upon what did it authorize that tax to be levied, upon the property or estate of the deceased person, or upon the right or privilege of his beneficiaries to receive his estate by inheritance or devise? If upon the latter it is settled by the great weight of authority that it does not fall within the regular ordinary taxation upon property which our Constitution requires shall be in proportion to its value. * * *

"A succession tax is an excise or duty upon the right of a person or corporation to receive property by devise or inheritance from another, under the regulation of the State.

"Section 1a of the Act requires the tax to be levied upon the appraised value of the whole estate left by the deceased. The tax is at once levied upon that estate, and the personal representatives of the deceased, not the devisees and legatees, are required to pay the tax. We think the language of this Act imposes a tax directly upon the property of the decedent, and not upon those who may succeed to his estate, and it must be conceded that if it is a property tax it is unconstitutional, because it subjects it to additional property tax to that levied upon all other like property in the State for the same year, and it is not levied in proportion to its value.

"But in no event can the Act of 1895 be upheld, because the tax authorized by it is not 'uniform upon the same class of subject within the territorial limitations of the authority levying the tax.' Section 3, article IX., Constitution of Missouri.

"It is significant that in New York, Maine, Maryland, Virginia, Pennsylvania, and Massachusetts, in which inheritance taxes are sustained, the statutes only authorize a uniform rate of taxation.

"The constitutional guarantee of uniformity upon the same class of subjects would avail but little if the legislature can arbitrarily vary the classes as often as the amount of property devised or transmitted by inheritance shall differ. * * * Where the amount of property received is made the basis of the tax, uniformity can only be attained by levying the same per cent. upon the property of each beneficiary under the will or by inheritance. * * * When the legislature makes the amount of money received by each the test of classification, it runs counter to another principle, that is well nigh universally accepted, that the uniform rate of taxation upon every man's property secures equality of burden. To levy a different rate simply because the amount of each man's holdings is different would produce favoritism and destroy the principle of equality before the law, which is the boast of every government. If it be urged that the one receiving the larger estate enjoys a greater privilege, still the principle of uniformity answers that the value of his right to receive is in direct proportion to the value of the property to which he succeeds, and must, if taxation is to be uniform, be taxed in the proportion, or according to one common rate."

So in *State vs. Ferris*, 53 Ohio State Reports, 314, the Act of April 20th, 1894, entitled "An Act to impose a direct

inheritance tax," whereby a progressive tax was imposed upon the estates exceeding \$20,000 in amount, was held unconstitutional. The opinion of the court contains the following:—

"Our Constitution requires equality in our tax laws, and also equality in their execution as near as may be. The only exemption allowed, as to taxation of property, is personal property to the amount of \$200 to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The Constitution must be regarded as consistent with itself throughout, and as section 2 of article XII. permits an exemption from taxation of personal property not exceeding \$200, a construction of section 2 of the Bill of Rights is thereby evinced to the effect that in taxation on subjects other than property, an exemption up to \$200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent. must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the Constitution, and it is this equality that is to provide a safeguard of us all. It was this principle, more than any other, that induced the decision of *Kocking Coal Co. vs. Rosser*, 52 O. S., 12.

"In support of the law it is urged that this exemption and graduation must be sustained upon the ground that the cost of administration in a small estate are proportionately larger than in a larger one, and that therefore the small estate should be free from this taxation. The answer is that equality in taxation is required by the Constitution, and that our administration laws are enacted upon the principle of equal protection and benefit of the people, and this unequal mode of taxation is not required to remedy any defect in the burdens of these laws.

"Again, it is urged in support of the law that an estate not exceeding \$20,000 is in the nature of a necessity for the support of widow and children; that the widow and children succeeding to so moderate a property ought to be exempted from paying the State anything for the privilege. The answer to this, as well as to the former proposition, is that we are not here considering the policy or equity of this exemption, but the power of the legislature to make such discrimination when prohibited from so doing by the second section of the Bill of Rights.

When this power is once conceded, the manner of exercising the same is limited only by the will of the legislature. In determining constitutional questions, courts should not attempt to solve them by reasoning only along the lines of the principles of equity. But the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what has heretofore been regarded as equity in particular cases, or upon a particular subject matter. The question is, therefore, not what would be equitable, but what is constitutional. Equity cannot be permitted to override the Constitution.

"Again, it is urged in favor of the statute that the State has the right to say that the heir or legatee or the devisee of a large property enjoys a disproportionate privilege because what he received is in the nature of a luxury, and luxuries ought to be subject to higher taxes. The answer to this is that the value of the right to receive is in direct proportion to the value of the property received, and must under the Constitution be taxed according if taxed at all. As to the higher tax by on luxuries, it may be said that such a rule might find a place in tariff legislation, where all are free to indulge in the luxuries, or not as they see fit, but that such a rule can find no support in taxation under a Constitution requiring equality in taxation and laws to be for the equal protection and benefit of all.

"Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the State has the right of saying that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death.

The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances, and if further regulation is desired purely as regulation aside from revenue, it would most likely be sought in the amendment of these statutes.

"The Act is clearly one for taxation and not for regulation, as is shown by its provisions and title. The State finds no warrant in its Constitution for saying that it will make a greater rate or charge for the privilege of succeeding to large estates than to smaller ones, but on the contrary, it is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people."

So in *State vs. Gorman*, 40 Minn., 232, the Act of 1885 imposed a tax graduated upon a progressive schedule, and

exempted estates of \$2000 and less. The Act was held unconstitutional. The court said:—

"It is apparent that these exactions are taxes, and if the constitutional rule of approximate equality has been disregarded, the law cannot stand. It seems hardly necessary to refer particularly to the schedule of values and of amounts required to be paid to show that the law wholly fails in apportioning the burden imposed, to regard the constitutional rule of equality measured with reference to the value of the property taxed.

* * * While a large discretion must be allowed to the legislature in devising schemes for taxation so as to secure equality as nearly as may be, it can hardly be doubted that in this case the constitutional requirement was not observed, very likely for the reason that it was not considered that these exactions were taxes within the meaning of the Constitution. We feel certain that they must be so regarded.

"The same reasons for the conclusion that these exactions constitute an unconstitutional mode of taxation, lead also to the conclusion that the law is opposed to section 8, article I., of the Constitution."

And the same rule was enforced in *Curry vs. Spencer*, 61 N. H., 624, where the court said:—

"An answer to the inquiry is readily afforded; for while by article V. of our Constitution the legislature is empowered to assess and levy taxes, this grant of power is expressly limited to 'proportional and reasonable assessments, rates, and taxes upon all the inhabitants and residents within the said State, and upon the estates within the same,' and by the Bill of Rights (article XII.) every inhabitant is bound to contribute only his share, which manifestly, and according to the uniform decisions of this court for more than half a century, cannot be more than his proportional share of the common burden.

"Immunity from disproportional taxation being expressly reserved in our Bill of Rights, and the power of proportional taxation only being granted the legislature by the Constitution, we are unaware of any ground upon which the statute under consideration can be upheld; for if it is to be regarded as a tax on property, it is open to the objection of unequal and double taxation, and if it is to be regarded as a tax on a civil right or privilege, it is discriminating and disproportional.

"We therefore go no further than to say that if the legislature deems it expedient to defray the expense of Probate Courts by a tax upon the recipients of estates therein adjudicated, such taxes must be proportional, and constitute only the just share

of those upon whom it is imposed; that it cannot lawfully make discriminations and cast the burden upon one class of beneficiaries and exempt all other classes from its operation; and that it cannot, therefore, for the purposes of taxation, exempt legacies and successions to husband, wife, children, and grandchildren, and include only those of the collaterals and others than those specified.

"Chapter 64 must be declared void and inoperative, and the plaintiff is advised accordingly."

On the other hand are the cases in which such exactions from the funds of estates have been sustained as not an exercise of the taxing power as such, but an exercise of the State's power to regulate the devolutions of estates of decedents. In the leading case of *Kochersperger vs. Drake*, 167 Ill., 122, the following is found:—

"The existence of the common law within the State of Illinois results from the provisions of chapter 28 of the Revised Statutes, which declare that the common law of England and the statutes of a general nature made prior to the fourth year of James I. shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority. By that authority chapter 39 of the Revised Statutes, entitled 'An Act in regard to the descent of property,' and chapter 148, entitled 'An Act in regard to wills,' were enacted, which in effect repealed the common law in reference to inheritance, and also repealed the statute enacted prior to the fourth year of James I. in reference to devises. There is not in force in this State under chapter 28 any law providing for the descent or devise of property. The laws of descent and the right to devise and take under a will within the State of Illinois owe their existence to the statute law of the State. The right to inherit and the right to devise being dependent on legislative Acts, there is nothing in the Constitution of this State which prohibits a change of the law with reference to those subjects at the discretion of the law-making power. The laws of descent and devise being the creation of the statute law, the power which creates may regulate, and may impose conditions or burdens on a right of succession to the ownership of property to which there has ceased to be an owner because of death, and the ownership of which the State then provides for by law of descent or devise. The imposition of such a condition or burden is not a tax upon the property itself, but on the right of succession thereto. To deny the right of the State to regulate the administration of a decedent's estate. * * * No want of

uniformity with one living who owns property can be urged as a reason why the statute makes an inconsistent rule. No person inherits property or can take by devise except by the statute, and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown. Laws of this character have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina, and other States. They have been held invalid in New Hampshire and Ohio and some other States. We are not disposed to enter into an analysis of these cases and a consideration of the principles on which they have been decided. The broad principle presented is that the legislature may create new classes of property with reference to estates, under which they may regulate the right to inherit or devise and take under devises; and such right existing, such classes may be created, and as created may be uniform; and the assessment by valuation when declared to operate equally on the right to succession to such classes, is not a violation of the provisions of the sections of article IX. of the Constitution of the State of Illinois."

So in *re* House Bill No. 122, Supreme Court of Colorado, the court was requested by legislature to render its opinion as to whether a proposed statute was in conflict with the provisions of the State Constitution. The opinion rendered was as follows:—

"*Per curiam.* The bill attached to the interrogatory provides for the levy and collection of what is commonly designated as an inheritance tax. The right to impose such tax is based upon the power of the State in its sovereign capacity to regulate and control the transmission of property by inheritance. Although designated as a tax, it is not such a tax upon property as is contemplated by section 3 of article X. of the State Constitution. It is rather a contribution which the State levies, for it is a condition upon which the title to property shall pass upon the death of the owner; hence the interrogatory propounded must be answered in the negative."

In *Minot vs. Winthrop*, 167 Pass., 113, such a tax was sustained upon the ground stated, as follows:—

"Statute of 1891, chapter 425, entitled, 'An Act imposing a tax on collateral legacies and successions,' is constitutional, as the privilege of transmitting and receiving by will or descent property on the death of the owner is a 'commodity' within the meaning of this word in the Constitution of Massachusetts,

chapter 1, section 1, article IV., and an excise may be allowed upon it; and the objections that a tax is unequal because not imposed upon all estates and upon all heirs, devisees, legatees, and distributees, and is unreasonable on account of the exemptions in the first section, 'that no estates shall be subject to the provisions of this Act unless the value of the same, after the payment of all debts, shall exceed the sum of \$10,000,' are not well founded."

But Lathrop, J., dissented, saying:—

"So far as I am aware, no excise tax heretofore passed in this Commonwealth has contained an exemption. Assuming that reasonable exemptions may be allowed, it seems to me that the legislature in the statute now before us has so far exceeded its powers that the exemptions should be construed as so unreasonable, as to work so great an inequality, that the Act should be pronounced unconstitutional.

"There is also another objection to which I see no answer. If this tax is to be considered unconstitutional, on the ground that it is a tax upon the privilege of taking by devise or succession, there is clearly on the face of the Act no equality. Suppose A. and B. die seized of separate estates, the respective values of which, after payment of debts, are \$10,000 and over \$10,000. A. bequeaths a legacy to C. of \$5000 and B. bequeaths a legacy to D. of the same amount; C. and D. each enjoys the same privilege, yet C. pays no tax while D. pays a tax of \$250. Can this be said to be equal, or even reasonable? The necessary effect of the tax is to produce inequality, and in my judgment it is as much the duty of the court to declare the statute to be in violation of the Constitution as if it imposed a tax upon property and were disproportionate."

It is to be noted in this case that there was no question of a progressive graduated tax, but simply the question of an exemption.

And in *State vs. Hamlin*, 86 Me., 495, there was no progressive tax, but simply an exemption of \$500.

In *Gelsthrope vs. Furnell* (Montana), 51 Pac. Rep., 267, the court said, as a ground for sustaining a statute containing this exemption:—

"The reasoning of the many cases upholding such laws proceeds upon the indisputable proposition that the State has the power, unless denied it by constitutional prohibitions, to regulate the devolution and distribution of an intestate's property and equal authority to limit the power of a testator to bequeath his property to whom he pleases."

This citation of cases justifies the assertion that there is no authority for the proposition that in a taxing statute the rate of tax imposed may be increased in a graduated scale according to the value of the property taxed. The State decisions, which might seem to support such a proposition, when examined, only go to the extent of holding that a sovereign State, having control over the estates of decedents, may by statute designate the public treasury as the distributee of such portion of an estate as the legislature may think proper, but such legislation is not properly speaking an exercise of the taxing power.

CONCLUSIONS.

1. The only Federal power which can be invoked to sustain the provisions of the Act of June 13th, 1898, which are here questioned, is the taxing power. Congress has no power to legislate with reference to the devolution of the estates of decedents or to regulate or control the exercise of the testamentary power of citizens in the several States.

2. This legislation cannot be sustained as a direct tax. It is in effect a tax upon the entire net personal estate of each decedent, and as such comes within Mr. Hamilton's definition of a direct tax.

3. If the tax be held to be an indirect tax, it fails to comply with the constitutional requirement of uniformity.

The court is therefore asked to hold the provisions of the statute invalid as in violation of the Federal Constitution.

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*Of Counsel for the Fidelity Insurance, Trust and Safe
Deposit Company.*

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH ET AL.,
Appellants,

vs.

F. E. COYNE, Collector, &c., *et al.*,
Appellees.

No. 225.

EBEN J. KNOWLTON ET AL.,
Plaintiffs in Error,

vs.

FRANK R. MOORE, Collector, &c.,
et al.
Defendants in Error.

No. 387.

Brief for Appellants and Plaintiffs in Error.

I.

These cases, and the errors relied upon in each, are fully stated in the briefs of other counsel, and therefore this one will be confined to a discussion of the legal questions supposed to be involved in both.

The unusual character of the act in controversy in these cases makes it necessary, before discussing the principal questions, to ascertain upon what subject the charge or burden is actually imposed. What is the correct legal construction of Sections 29 and 30 of the statute in this respect? Do they impose a tax or a condition upon the privilege of disposing of personal property by will, or on the privilege of receiving each legacy and distributive share conferred upon the legatees and distributees by the laws of a State or Territory, or do they impose the tax or duty upon the whole personal estate of the deceased disposed of by will and distributable under the laws of a State or Territory *in solido*, when it exceeds ten thousand dollars in value, or upon the property representing each legacy and distributive share separately? We insist that they cannot be so construed as to impose a tax or a condition upon the privilege of disposing of property by will, or upon the privilege of receiving a legacy or distributive share under the will, or under the law of the State or Territory; but that, if so construed, they are unconstitutional and the tax is invalid, because, with that construction, it is an attempt, under

the guise of taxation, to regulate and control a subject over which Congress has no power, but which is within the exclusive jurisdiction of the States. The privilege or right to make last wills and testaments and to take property under them, and by inheritance when there is no will, is not conferred by the United States, but by the several States in the exercise of their reserved power to legislate upon all matters of purely local concern, and by the Territories in the exercise of the authority vested in them by their organic acts. The power to regulate the administration of decedent's estates, to declare who shall be competent to make last wills and testaments, to provide the manner in which they shall be executed, and to determine who shall be competent to take under them, and the conditions upon which they shall succeed to the ownership of the property, as well as the power to establish rules of inheritance and distribution, and to impose all such conditions and limitations upon the rights and privileges conferred upon the beneficiaries as they may deem proper, belongs exclusively to the States (*McCormick vs. Sullivan*, 10 Wheat., 202; *United States vs. Fox*, 94 U. S., 315; *Green vs. Van Buskirk*, 72 U. S., 370; 74

U. S., 139; *Hervey vs. Rhode Island Locomotive Works*, 93 U. S., 664; *New York vs. Milne*, 11 Pet., 102; *Gibbons vs. Ogden*, 9 Wheat., 1).

They constitute parts of that great mass of power over local and domestic affairs, and over property situated within their limits which was not surrendered to the general Government, or in any manner abridged or impaired by the letter or spirit of the Constitution. They are of the same exclusive nature as the power to regulate marriage and divorce, to establish the legal relations between parent and child, guardian and ward, principal and agent, trustee and *cestui que trust*, and to determine in what mode and upon what conditions contracts shall be made for the transfer of property within the State. In fact, the power of the State over this subject is more absolute and exclusive than it is over any of the others mentioned, because it has been held by this Court, and by most of the State courts also, that no one has an original or natural right to dispose of his property by will, or to take property by devise or bequest, or by inheritance, and that all these rights and privileges are held and enjoyed wholly at the will of the State. The whole right being acquired from

the State, the exclusive power to regulate its exercise necessarily belongs to the State.

In *Mager vs. Grima*, 8 How. (49 U. S.), 490, Chief Justice TANEY, in delivering the opinion of the Court, said :

“Now the law in question is nothing more than an exercise of the power which every State and sovereignty possesses of regulating the manner and terms upon which property, real or personal, within its dominion, may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. Every nation may, unquestionably, refuse to allow an alien to take either real or personal property situated within its limits, either as heir or legatee, and may, if he thinks proper, direct that property so descended or bequeathed shall belong to the State. * * * And if a State may deny the privilege altogether it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy.”

In that case the legatee was an alien, but the principle upon which it was expressly decided was broad enough to embrace all legacies and inheritances, and was afterwards approved and

applied in *United States vs. Perkins*, 163 U. S., 625, where the Court said :

“ Though the general consent of the most enlightened nations has from the earliest historical period recognized a natural right in children to inherit, we know of no legal principle to prevent the Legislature from taking away or limiting the right of testamentary disposition, or imposing such conditions upon its exercise as it may deem conducive to the public good. In this view the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases ; a declaration that in the exercise of that power he shall contribute a certain percentage to the public use ; or, in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose. Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury *before the bequest shall take effect*. The tax is not upon the property in the ordinary sense of the term, but *upon the right to dispose of it*, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee. * * * This, therefore, is not a tax upon the property itself, but is merely the price exacted by the State

for the privilege accorded in permitting property so situated to be transferred by will or by descent or distribution."

And again, in *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S., 283, the Court, after citing a number of authorities, said :

"It is not necessary to review those cases or state at length the reasoning by which they are supported. They are based on two principles :

"1. An inheritance tax is not one on property, but one on the right to succession.

"2. The right to take property by devise or descent is the creature of the law and not a natural right—a privilege, and therefore the *authority which confers it* may impose conditions upon it.

"From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between them and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation."

The Supreme Court of Illinois in the case of *Kochersperger vs. Drake*, 167 Ill., 127, had construed the statute and held that it did not impose a tax on the property itself, but on the right to dispose of it by will or to take it by inheritance;

and this Court, as it always does except in cases involving the validity of contracts which are alleged to have been impaired by State legislation, accepted that construction without discussion. The Court in Illinois said:

"To deny the right of the State to impose such a burden or condition is to deny the right of the State to regulate the administration of a decedent's estate. When by the Act of June 15, 1895, for the taxation of gifts, legacies and inheritances in certain cases, the Legislature prescribed that a certain part of the estate of the deceased person shall be paid to the treasury of the proper county for the use of the State, it was in effect an assertion of sovereignty in the estates of deceased persons. * * * The amount reserved to the State from the estate of a deceased owner is not a tax on the estate, but on the right of succession."

The Illinois act is quite similar in some of its provisions to the one involved in these cases, while in others it is very different; and even if this Court had itself construed it as not imposing a tax upon the property, but a duty or a condition upon the right or privilege of disposing of it, or of receiving it, the decision would not have been conclusive in these cases.

One very important feature of the Illinois act, having a direct bearing upon its construction, was that the progressive rates were based on relationship and the *values of the shares* taken by the beneficiaries, and not, as in this case, by the relationship and the value of the whole estate from which they are taken. The State took its contribution out of each share in proportion to its value, and provided that it should be deducted *from the share* by the administrators, executors and trustees.

It must be borne in mind also that it was a State statute, enacted by the same authority that conferred the right or privilege to make wills and take legacies and inherit property, and that it was not passed in the exercise of the authority to tax, but in the exercise of the exclusive authority to impose conditions upon the right to make wills and the right to inherit property, and to regulate the administration of decedents' estates. The question presented in this Court was simply whether, in the exercise of such authority, the State had denied to any person the equal protection of the laws, and its solution depended solely upon the question whether the regulations operated unequally upon the constituents of the

same class. The State having undoubted power to declare that no one should be capable of disposing of property within its limits by will, or of receiving a legacy or distributive share out of property within its limits, necessarily had the power also to declare the terms and conditions upon which the right or privilege, when conferred, should be enjoyed, and to create classes and impose different terms and conditions upon the different classes. But the United States possess no power to determine who shall or who shall not dispose of property by will, or who shall or shall not take property under a will or by inheritance, and therefore, unless its provisions are so plain and conclusive as to preclude every other construction, an act of Congress cannot be so interpreted as to impose a tax or condition upon these rights or privileges, or—which, in legal effect is precisely the same thing—to regulate the administration and distribution of decedents' estates.

The Constitution of Illinois provides that:

“The General Assembly shall provide such revenue as may be needful by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to

the value of his, her or its property" (Art. IX., Sec. 1).

If the State legacy and inheritance law had been construed as a tax law, it would have been a clear violation of the State Constitution, because it did not impose the burden in proportion to the value of the property, but made discriminations in the rates on account of the value of the legacy or share and the relationship of the parties to the decedent, and exempted different amounts in the hands of the different classes. Under that law the title to so much of the property as was appropriated to the State never vested in the devisee, legatee or heir, but was, as said by the Court in the Drake case, "reserved to the State;" or, as was said by this Court in *United States vs. Perkins*, "it is not until it has yielded its contribution to the State that it becomes the property of the legatee." Under that act, if the legacy or share was payable in money, the administrator, executor or trustee was directed to deduct the State's portion before making any payment to the legatee or heir, and charge it against the legatee or distributee; and, if the legacy or distributive share was not payable in money, the administrator, executor or trustee

was required to collect from the beneficiary the amount going to the State, and they were forbidden to deliver any specific legacy or property until such collection had been made for the State. The administrators, executors and trustees were authorized by the act to collect the contributions from the beneficiaries by legal proceedings, if necessary, and thus place them in the estate of the decedent in order that the State might take its share under the law (Rev. Stat. 1896, Ch. 120, Par. 319). It did not, therefore, impose a tax upon the legacy or share, or on the property itself in the hands of the legatee or heir, or in the hands of the administrator, executor or trustee, but deducted the contribution of the State from the estate of the decedent before the legatee or heir could receive either the title or the possession; in other words, the act made the State itself a legatee or heir, as the case might be, and gave it a preference over all others in the distribution.

Upon the theory that the act was a regulation of the administration of the estates of decedents, or upon the theory that a State may wholly deny the privilege of disposing of property by will, or receiving it under a will or by inheritance,

and may, therefore, when the privilege is granted, or afterwards and before the title is vested in the beneficiary, appropriate such part of the estate to itself as it chooses, the Illinois statute might very well be sustained as one imposing a condition or burden upon the enjoyment of a privilege or right granted by the State. It could not have been sustained as a valid law under the Constitution of the State upon any other ground. But no such theories can have any weight in the interpretation of an act passed by Congress on this subject, for the obvious reason that it has no control over devises, bequests or inheritances, and can neither grant nor withhold any privilege concerning them. When it imposes a charge or burden upon legacies and distributive shares, or upon the property out of which they arise, as is the case here, it does so in the exercise of its general power to lay and collect taxes, duties, imposts and excises. The act under consideration must, therefore, be treated as a tax law pure and simple, and, being so, it must be construed according to the same rules that are applied to other tax laws; and the power to enact it must be tested and limited by the same constitutional provisions that are applicable to other cases of taxation.

The States legislate upon these subjects independently of their power of taxation, but Congress does not and cannot. Over certain subjects the power of the United States and the power of the several States is independent and concurrent, while over others the power of one or the other is exclusive. Generally they may legislate upon the same subjects, and may tax the same things at the same time; but in case of conflict the paramount authority, whether it is vested in the United States or in the State, must prevail. We have, as was said in *Ableman vs. Boothe*, 21 How., 509, "two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers and each, in its sphere of action, prescribed by the Constitution of the United States, independent of the other."

In *New York vs. Milne*, 11 Pet., 102, the Court based its decision upon what it stated to be "impregnable positions," as follows:

"That a State has the same undeniable and unlimited jurisdiction over the persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restricted by the Constitution of the United States. That, by virtue of this, it is not only the right but the bounden

and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to these ends, where the power over the particular subject, or the manner of its exercise, is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained, and that, consequently, in relation to these the authority of the State is complete, unqualified and exclusive." (See, also, *United States vs. Dewitt*, 9 Wall., 41; *License Tax Cases*, 5 Wall., 462.)

"The Constitution, in all of its provisions, looks to an indestructible Union, composed of indestructible States" (*Texas vs. White*, 7 Wall., 700; see *Lane County vs. Oregon*, 7 Wall., 71). It is evident that the States are not indestructible in any proper sense of the term if Congress may constitutionally impose unlimited taxation or destructive conditions upon rights, privileges and franchises conferred by their legislation in the exercise of the power to control their own internal affairs; and that the power of Congress to tax, and the power to impose conditions, if

they exist, are unlimited, and may be so used as to destroy the right, privilege or franchise upon which the taxation or condition is imposed, cannot be disputed. By such means every faculty of the State, except its capacity to exist merely as a political body, might be rendered useless so far as its exercise could benefit its citizens.

What we insist upon is that, as the right to dispose of property by will, or to take it under a will, or by inheritance, not being a common right existing independently of legislation, but being created or conferred by the several States in the exercise of their exclusive power over the subject, no other government can impair or interfere with it by imposing taxes or conditions upon its enjoyment. On this subject the power of the States and of the United States is not concurrent. The reserved power of the States is independent and exclusive, or, as was said by Justices DAVIS and NELSON, in their dissenting opinion in the *Veazie Bank* case, "as supreme as before they entered into the Union."

It is essential to the preservation of our system of government that the line of demarkation between the delegated powers of Congress and the reserved powers of the several States should

be distinctly defined and scrupulously respected, and this Court has never hesitated, when a proper case was presented, to condemn the legislation of either one when it encroached upon the rights of the other. We feel confident that, if the proper construction of the act imposing this tax or condition requires a decision of the question, the Court will sustain the exclusive power of the States over this subject in respect to the imposition of taxes and conditions, as well as in respect to the regulation of descents and distributions.

But the act under consideration does not purport by its terms to impose a burden or condition upon the devolution of the title to the property, or upon the privilege of disposing of it, or receiving it from the estate of a deceased person, and the nature of the subject and the absence of power over it forbid the Court to put a strained construction upon it in order to attribute such a purpose to Congress. No authority exists in that body to take money or other property from the people for public purposes except by direct taxation, or by the imposition of uniform duties, imposts and excises, or by providing for just compensation to the owner in all other cases.

The power of Congress, however, to tax property, as such, having been expressly delegated by the Constitution, subject only to the rules of apportionment and uniformity, and the exclusive power over the subject of wills and the distribution of estates of decedents having been reserved to the States, it must be presumed, in the absence of conclusive evidence to the contrary, that the act now in question was not intended to obstruct or in any manner interfere with the State regulations concerning wills and inheritances, but was passed in the exercise of the authority expressly conferred.

The act of June 30, 1864 (13 Stat., 218), imposed a tax upon legacies and distributive shares of personal property, and also upon successions to real estate, but the provisions of the act on these two subjects were contained in separate sections, and it is plain that it was the purpose of Congress to make a distinction between the character of the tax or duty imposed in the two cases, for otherwise there was no reason why they should not be provided for in the same sections, or why different language should be employed in designating the thing taxed. At that time it was generally understood that a tax on

real estate was a direct tax, but that a tax on personal property was not; and therefore, while the tax was imposed directly upon the property held in charge or trust for the payment of legacies and distributive shares, and the rates were varied according to the relationship of the beneficiaries to the decedent, the phraseology was changed in the case of successions to real estate, and the tax or duty was expressly imposed upon the "devolution" or transfer of title. If it had been then intended to lay the tax or duty in both cases, either upon the property itself, or upon the devolution or transfer of ownership, or upon the privilege of disposing of the property or taking it under a will or under the law, it is impossible to account for the deliberate change in the phraseology of the act. (See Secs. 124, 150, Act of 1864, 13 Stat., pp. 285-291.) The statute now in controversy, so far as it classifies the beneficiaries, is simply a re-enactment of the law of 1864 upon that subject, but it contains additional provisions which clearly show a purpose to impose the tax upon the entire personal estate, and not upon the privilege or upon the legacies and distributive shares separately. It alters the basis of the valuation or assessment

in order to make the highest rate and amount of the tax depend upon the value of the whole personal estate held in charge or trust for the payment of legacies and distributive shares, and not alone upon the relationship, as was the case under the old act.

The new provisions inserted in the act now before the Court are as follows :

“Where the whole amount of said personal property shall exceed in value ten thousand dollars, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be,” etc., etc.

* * * * *

“Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rate of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by

two and one-half; and, where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

Whatever may have been the true construction of the original act, we think the purpose and effect of these additional provisions cannot be misunderstood.

The question as to the constitutionality of the act of 1864 imposing a tax or duty upon legacies and inheritances never came before this Court or before any other Court of the United States so far as we know; but in *Scholey vs. Rew*, 23 Wall., 331, the validity of the tax or duty on successions to real estate was involved, and the Court held, upon the authority of previous adjudications as then interpreted, that, as it was not a tax on the real estate, it was not a direct tax, but was a duty on the "devolution of title," and the constitutionality of the tax was sustained upon that ground. There could be no ground for controversy concerning the true construction of the act, for its language was plain as to the thing intended to be taxed; but the question whether Congress possesses power to impose a tax or condition upon the exercise of a

right or privilege of this character conferred by the State was not presented in the argument or considered by the Court, and, therefore, the case is not a conclusive authority on that point. Nor did the Court in that case consider the effect of the exemption of all estates not exceeding ten thousand dollars in value, or the effect of the classification, or of the progressive rates of taxation based on the relationship of the beneficiaries to the decedents.

In *Clapp vs. Mason*, 94 U. S., 589, and in *Mason vs. Sergeant*, 104 U. S., 689, the only question decided by the Court was that the tax on the succession to real estate in those cases had not accrued prior to the repeal of the act imposing it; and in *Sturgis vs. United States*, 108 U. S., 363, which was a suit by the Collector to enforce the payment of the legacy tax, it was also held that it had not accrued before the passage of the repealing act, which took effect October 1, 1870. In *United States vs. N. Y. Life Ins. & Trust Co.*, 9 Benedict, 413, which was an action to enforce the collection of a legacy tax, Judge BLATCHFORD decided that there could be no recovery because the act had been repealed before the legacy took effect.

Except in the case of successions to real estate we are not aware of an instance in which Congress has attempted to impose a tax or burden upon a privilege or franchise granted by a State in the exercise of its exclusive authority to regulate and control its purely internal affairs. In the case of *Veazie Bank vs. Fenno*, 75 U. S., 533, this Court decided that the tax in controversy was not imposed upon the property of the State banks, or upon their franchises, but upon the circulation or use of their notes as a currency, and that it was a duty or excise and not a direct tax. It was argued at the bar that if Congress possessed the power to impose such a tax it might destroy a privilege conferred upon the State banks by the laws of the several States, and that it could not do indirectly, under the guise of taxation, what it had no power to accomplish by direct legislation. Chief-Justice CHASE, who delivered the opinion of the Court, said:

“Is it, then, a tax on a franchise created by a State which Congress, upon any principle exempting the reserved powers of the States from impairment by taxation, must be held to have no authority to lay and collect? We do not say there may not be

such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation, for franchises are property, often very valuable and productive property, and, when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property. But in the case before us the object of taxation is not the franchise of the bank, but property created or contracts made and issued under the franchise or power to issue bank bills."

Further on the Court, after having stated the power of Congress to provide a circulating medium for the country, said:

"Having thus in the exercise of undisputed constitutional powers undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of

legal tender to foreign coins and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

As the Court held that the tax in controversy was not imposed on the franchise, the observations concerning the powers of Congress in relation to that subject were *obiter dicta*; but assuming that franchises granted by a State which are of such a nature as to constitute property, are taxable as property by the United States, the rule would not apply in these cases, for it will not be contended, we presume, that the privilege of making wills or of receiving legacies or inheritances is property. It is a mere privilege which the State may grant or withhold at pleasure, and, having been granted, it may be taken away by the State at any time before property rights have actually been acquired under the law by

the transmission of title from the decedent to the devisee, legatee or heir.

Justices NELSON and DAVIS differed from the construction placed upon the act by the majority of the Court, and dissented from the opinion on the ground that it was a tax upon the franchise granted by the State. They said :

“ As we have seen in the forepart of this opinion, the power to incorporate banks was not surrendered to the Federal Government, but reserved to the States; it follows that the Constitution protects them, or should protect them, from any encroachment upon this right. As to the powers reserved, the States are as supreme as before they entered into the Union, and are entitled to the unrestrained exercise of them. The question as to the taxation of the powers and faculties belonging to government is not new in this court. * * * It is true that the present decision strikes only at the power to create banks, but no person can fail to see that the principle involved affects the power to create any other description of corporation, such as railroads, turnpikes, manufacturing companies and others.”

The same question came before this Court again in *Merchants' National Bank vs. The United States*, 101 U. S., 1, and the tax was

again sustained, but the decision was based upon the sole ground that Congress possessed paramount authority over the subject of the currency, and could, therefore, tax out of existence, if necessary, the circulation of State bank notes or notes issued by municipalities. The Court, after quoting from the case of *Veazie Bank vs. Fenno*, said:

“The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out; that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore, the banker who helps to keep up the use by paying them out—that is, employing them as the equivalent of money in discharging his obligations—is taxed for what he does. The taxation was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do.”

Considering these two cases together, we think it may be safely asserted that this Court has never authoritatively decided that Congress possesses the power to impose a tax or charge

upon any privilege or franchise granted by a State, especially a privilege or franchise relating to a subject over which the State itself has exclusive control.

The suggestion, therefore, that it was the purpose of Congress to impose a tax or condition upon the exercise of the power to make wills, or to impose a tax or duty upon the privilege of receiving legacies or distributive shares, is not only inconsistent with the language and structure of the act, and with its history, but attributes to that body an attempt to interfere with State regulations upon a subject within their exclusive jurisdiction. It is true that, although the title to the property bequeathed or inherited is vested in the legatee or distributee by the laws of the State or Territory immediately upon the death of the former owner, the beneficiary cannot under this act, if it is valid, secure possession of it until the tax or duty is paid; but, if the tax or duty has been constitutionally imposed in the exercise of a power conferred upon Congress, this provision might be regarded merely as providing a mode for its collection. Otherwise, it is a plain regulation of the administration of decedents' estates and a

direct interference with the existing laws of the States and Territories on that subject, and is void for the same reasons so often given by this Court in cases where State legislation has attempted to obstruct or interfere with interstate or foreign commerce by taxation, or by the imposition of burdens in other forms upon the business of conducting it.

This is not a personal tax or duty, but a property tax. It is not like the tax imposed by the same act upon sales of merchandise made at exchanges, boards of trade, and other similar places, which was involved in the case of *Nicol vs. Ames*, 173 U. S., 509. In that case it was held that the tax was imposed upon the privilege of making sales at such places, and not on the property; and its payment was enforced by penalties upon the person making the sales, and not by the seizure or sale of the property itself. In the present case the administrators, executors or trustees having the property in charge or trust are required by the act to pay the tax or duty before satisfying the legacies or making distribution, but the legatees or distributees to whom it belongs are not personally liable in any case, and if they should secure possession before

payment of the tax or duty, the only remedy of the Government is to enforce the lien. At the time the tax or duty attaches the property bequeathed or inherited belongs as absolutely to the legatees and distributees under the laws of the State or Territory as if it had been acquired by their own skill and labor, and the tax or duty is not deducted from it before their title vests, as is the case where a burden or condition is imposed by a State or Territory in the exercise of its power to grant or withhold the right to make wills or to inherit. This property, the title to which has vested in the beneficiaries under the laws of the State or Territory within whose exclusive jurisdiction it is situated, is entitled to all the protection afforded by the Constitution and the laws of the land; its owners cannot be deprived of it except by due process of law, nor can any part of it be taken from them for the public use except by constitutional taxation, or by making just compensation. The State or Territory itself cannot take it away from them, after the death of the former owner, except by the same processes, and upon the same considerations, that it could take other property within its limits. They may provide by law,

before the death of the owner, that no property shall be disposed of by will or pass by inheritance, or that a certain deduction or contribution shall be made for the public use when the ownership ceases by death, and that the shares of the beneficiaries under his will, or under the laws of inheritance, shall be diminished to that extent; but this is the utmost limit of their arbitrary power over the subject.

II.

The tax is imposed upon the whole personal property of a decedent held in charge or trust by administrators, executors or trustees, out of which legacies or distributive shares arise, except such parts of the estate as are taken out by the surviving husband or wife, and the rates of taxation are fixed upon the several parts held in charge or trust, not according to the amount or value of each share, but (1) according to the degree of relationship of the legatee or distributee to the former owner, and (2) according to the amount or value of "such personal property;" that is, the whole personal property held in charge or

trust and disposed of by will or distributed under the law. The language of the act is, that :

“Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, * * * shall be, and hereby *are*, made subject to a duty or tax to be paid to the United States,” etc., etc.

Considered by itself, and construed literally, this provision would mean that the administrators, executors or trustees having charge of the property are subject to the tax, but all the provisions of the act taken together show that the charge is really imposed upon the property in their hands out of which legacies and distributive shares are to be paid, and that they are merely charged with the duty of making the payment to the Government, “before payment and distribution to the legatees or any person entitled to beneficial interest therein.” Although such part of the property as may pass to the husband or wife of a decedent by will, or by the law, is exempt from taxation, this exemption does not,

by the terms of the act, or by the official construction of it, either reduce the valuation of the taxable estate, or affect the rate of the tax or duty upon the portions of the estate remaining for other legatees or distributees. For instance, if the value of the whole personal property disposed of by will, or distributable under the law, exceeds one million dollars, and all of it except five thousand dollars is given by will, or distributed under the law, to the husband or wife of the decedent, the five thousand dollars, if it goes to a lineal descendant or ascendant, is taxed at the rate of two and one-fourth per centum, or if it goes to certain collaterals, or to a stranger in blood, it is taxed at the rate of fifteen per centum; whereas, if the whole amount of the personal property subject to the payment of legacies and distributive shares had not exceeded ten thousand dollars, there would have been no tax at all on the part taken out to pay the five-thousand-dollar legacy or distributive share, no matter who received it.

The words "whole amount of such personal property as aforesaid," used in the first part of the act, unquestionably refer to the aggregate amount or value of the property held in charge

or trust by administrators, executors or trustees for the payment of legacies and distributive shares, including the part going to the husband or wife of the decedent, and whenever the same or equivalent words are employed in the act they mean the same thing. After thus designating the property upon which the tax is imposed, the act continues to refer to it as "such personal property," "said personal property," and "such property," leaving no doubt that the purpose was to tax the whole personal property held for the payment of the legacies and distributive shares, except the part taken by the husband or wife and so much as may be required to pay debts and expenses, but regulating the tax or duty on each part taken out of it as a legacy or share by the relationship of the legatee or distributee to the decedent, and by the value of the whole, including the share of the husband or wife. If the words above quoted refer to the separate parts of the estate taken out by the beneficiaries, instead of the whole personal estate left by the decedent, it follows that all legacies and distributive shares not exceeding ten thousand dollars in value are exempted, and that the progressive rates are varied according to the value of

each share. This construction, while it would not materially affect the argument in opposition to the constitutionality of the act, would greatly impair its operation as a revenue measure, and require the Government to refund much the larger part of the taxes already collected. Under such a construction, all legacies and shares not exceeding ten thousand dollars in value would be exempted, and a legacy or share valued at twenty-five thousand dollars, and taken by a lineal descendant, or a lineal ancestor, would be taxed three-fourths of one per cent., without regard to the value of the personal estate of the decedent ; whereas, under the act as officially construed and enforced, such a legacy or share, if taken out of a personal estate exceeding one million dollars in value, is taxed at the rate of two and one-quarter per cent.

In the Knowlton case, all property taken as legacies, without regard to its amount or value in each case, was taxed at the highest rates imposed by the act, simply because the personal estate out of which it was taken was of greater value than one million dollars. The property of one brother of the decedent, who received a legacy of one hundred dollars, and that taken by

another brother, who received a legacy of one hundred thousand dollars, were taxed at the rate of two and one-quarter per cent. ; whereas, if the rate of taxation and the exemption had been controlled by the value of the legacy, the part taken by one brother would not have been taxed at all, and the part taken by the other would have been taxed one and one-eighth per cent., or just half as much as was demanded and received by the Government (Record No. 387, p. 16).

Whenever the act refers to the separate legacies and distributive shares the language used is plain and appropriate. Section 29 provides that "where the whole amount of said personal property shall exceed in value ten thousand dollars, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be: First. Where the person or persons entitled to any *beneficial interest* in such property shall be the lineal issue or lineal ancestor, brother or sister, to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of *such interest* in such property," and this clear distinction between the several legacies and distributive shares and the whole amount or

value of the property held in charge or trust for their satisfaction, is preserved in every clause imposing the tax or duty and defining the rate. When the "amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars," the rates of duty or tax imposed by the five preceding clauses of the act upon the parts held for the payment of legacies and distributive shares to the different classes of beneficiaries, are to be multiplied by one and one-half; and this progressive system proceeds, according to the amount or value of the property out of which the shares are taken, until it exceeds the amount or value of one million dollars; but after that the tax or duty is proportional so far as it is affected by the value of the estate out of which the legacies or distributive shares are received, though it continues to be controlled by the degree of relationship to the decedent.

So far as the claim of the Government is concerned, the tax or duty is not apportioned or distributed upon the several legacies or distributive shares, but is charged against the entire personal estate left by the decedent, except that

part passing to the husband or wife, and the debts and expenses of administration, and, subject to these exceptions, every part of it may be subjected to sale for the payment of any part of the tax or duty, without regard to its ownership under the will or under the law. The only provision made for the release of any part of the estate from the lien created by the law to secure the payment of the entire tax imposed upon it, is contained in Section 30, which, after providing "that the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid and discharged to the United States," and, after providing for an enforcement of this lien by judicial proceedings, enacts that, when a sale is made, such sale and the deed made thereunder "shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act." If, therefore, the administrator, executor or trustee should actually pay to the collector an amount equal to

the tax upon the part of the property to be taken by one of the legatees or distributees, and receive his receipt for it, and should deliver the part to such legatee or distributee, it would still remain bound for all the other unpaid portions of the tax upon the whole estate.

This act does not provide, as was done in the Illinois statute, that the tax paid by the administrators, executors or trustees shall be charged to the respective legatees or distributees, but simply provides that the collector's receipt "shall be sufficient evidence to entitle such executor, administrator or trustee to be allowed such payment by every tribunal which by the laws of any State or Territory is or may be empowered to decide upon and settle the accounts of executors and administrators," which means simply that he shall be allowed credit on his general account in the settlement of his trust.

If it had been the purpose of the act to impose the tax upon the property representing each legacy or distributive share separately, or upon the privilege of disposing of or taking each legacy or distributive share separately, or upon the transfer or devolution of the title to each legacy or share, the progressive rates would un-

doubtedly have been varied according to the amount or value of the share received by each beneficiary, and not according to the amount or value of the entire personal estate held for the satisfaction or payment of all the shares. It is impossible under the act to determine either the rate or the amount of the tax to be collected without first making a valuation or assessment of the whole personal estate, including even the part going to the husband or wife, and, this having been done, the amount or value of each share, and the degrees of relationship, are material only for the purpose of making the calculations. For instance, property or money of the value of one hundred dollars taken out of an estate valued at more than one million dollars is subject to the same rate of taxation as property or money of the value of five hundred thousand dollars taken out of the same estate; but, when the hundred-dollar share is taken out of an estate of less value than twenty-five thousand dollars, the rate of taxation is only one-third as much.

Two estates of the same value, if distributed in the same proportions among beneficiaries bearing the same relations to the decedents, pay the same initial and progressive rates and the same

amounts of tax, but the parts of the property passing by will, or under the law, to beneficiaries who receive the same amounts out of two estates of different values, and who bear the same relations to the decedents, are subjected to very different rates. Such a result is, it seems to us, wholly inconsistent with the view that the charge was intended to be imposed upon the shares separately, or upon the privilege of receiving them.

Again, as already stated, although the property taken by the surviving husband or wife is not taxed, the rates of taxation upon the remaining parts taken by other legatees or distributees are regulated according to the value of the entire personal estate, including what is received by the husband or wife. All the provisions of the act show clearly that the valuation or assessment of the whole personal property of a decedent, held in charge or trust by administrators, executors or trustees, constitutes the basis of the tax, and we do not see that there is any language employed in it to justify the conclusion that the thing assessed is not the thing taxed.

III.

But whether the tax is imposed upon the whole personal property disposed of by will or

distributable under the law, and held in charge or trust by the administrator, executor or trustee, *in solido*, or upon the property representing each legacy or distributive share separately, or upon the privilege, it is a direct tax within the meaning of the Constitution, as construed by this Court, and is void because it was not apportioned.

The first clause in the enumeration of the powers delegated to Congress authorizes that body "to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States." If the Constitution had contained no other provision upon the subject, this alone would have been sufficient to make a distinction between "taxes" and "duties, imposts and excises," because the latter were required to be uniform throughout the United States, while the former was not. Other provisions show that the word "taxes," as used in the clause quoted, meant only direct taxes, and that the words "duties, imposts and excises," meant only indirect taxes. Direct taxes were required to be apportioned among the several States according

to their representative population, and this mandatory provision was supplemented by a prohibitory one declaring that "no capitation, or other direct tax, shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken." So far, therefore, as express constitutional requirements and prohibitions can protect the people of each State, and all the people of all the States, against discriminating taxation, it has been done. Apportionment of all direct taxes, in order that unjust burdens might not be imposed on the people of one State, or a few States, by levying contributions only on such property as they might own, or such as they might own in greater amounts than the people of other States; and uniformity in all indirect taxation, in order that all owners of the same kind of property everywhere might bear this part of the public burden equally, constituted the two safeguards which the framers of the Constitution provided for the protection of the States and their citizens against intentional or accidental discriminations in the legislation of Congress upon these subjects. We venture to say that no case was ever presented to this Court which more imperatively

demanded the enforcement of these constitutional guarantees than those now under consideration. The tax laid by the act now in controversy falls with peculiar hardship upon the people in certain parts of the country, while in others it can be applied only in very rare instances. If it had been apportioned, each State might have protected its own citizens against unjust discriminations by assuming its quota and raising the amount by uniform taxation upon property within its limits, under the provisions of its own Constitution; and, if it had been laid in accordance with the constitutional rule of uniformity, all property of the same kind and value would have been subject to the same rates and the same amount of taxation. But neither rule has been complied with; the tax is neither apportioned nor uniform, and, consequently, no matter whether direct or indirect, the law imposing it cannot be sustained as a valid exercise of power under the Constitution.

In discussing the constitutionality of this act we do not consider it necessary to cite all the authorities bearing upon the question, as most of them are referred to and commented upon in the arguments of associate counsel; and besides, this

Court has recently collated and reviewed them in the Income Tax Cases. On the second hearing of those cases, [Pollock vs. Farmers' Loan and Trust Company, 158 U. S., 601,] the Court, after a most exhaustive historical and legal investigation of the question, reached the conclusion that "taxes on personal property, or on the income of personal property, are likewise direct taxes." Perhaps no case before this Court has ever been more elaborately or ably argued than that one was on the two occasions when it was presented, and certainly no one ever received a more deliberate and thorough consideration at the hands of the Court. The act of 1894 imposed taxes, among other things, upon "money and the value of all personal property acquired by gift or inheritance" (Sec. 28), but the precise question presented in the case was whether taxation upon gains and profits arising from personal property was direct and subject to the constitutional rule of apportionment, and the Court held that it was, on the ground that a tax on personal property is direct, and a tax on the gains and profits derived from it is equivalent to a tax on the property itself. This decision, it seems to us, is conclusive in the present cases.

It is not possible to state the proposition more clearly than it is stated in the opinion of the Court, or to support it by stronger reasons than are there given. Among other things, the Court said:

“We know of no reason for holding otherwise than that the words ‘direct taxes’ on the one hand, and ‘duties, imposts and excises’ on the other, were used in the Constitution in their natural and obvious sense. Nor in arriving at what those terms embrace do we perceive any ground for enlarging them beyond, or narrowing them within, their natural and obvious import at the time the Constitution was framed and ratified.”

Again, after a reference to the history of the constitutional provision on the subject of taxation, the Court said:

“The Constitution prohibits any direct tax unless in proportion to numbers as ascertained by the census; and, in the light of the circumstances to which we have referred, is it not an evasion of that prohibition to hold that a general unapportioned tax imposed upon all property owners as a body for or in respect to their property is not direct in the meaning of the Constitution because confined to the income therefrom? Whatever the speculative views of political economists or revenue reformers may be, can it be properly held that the Constitu-

tion, taken in its plain and obvious sense, and with due regard to the circumstances attending the formation of the Government, authorizes a general unapportioned tax on the products of the farm and the rents of real estate, although imposed merely because of ownership and with no possible means of escape from payment, as belonging to a totally different class from that which includes the property from whence the income proceeds? There can be but one answer. Unless the constitutional restriction is to be treated as thoroughly illusory and futile and the object of the framers defeated, we find it impossible to hold that a fundamental requisition deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to the property and the property itself."

The Court also said :

" A direct tax cannot be taken out of the constitutional rule because the particular tax did not exist at the time the rule was prescribed."

In the opinion the Court uses the words " general unapportioned tax," but it is evident that it was not the intention to hold, even by implication, that no tax could be direct within the meaning of the Constitution unless it was general. But if a tax is not general unless imposed under a

general assessment upon all the taxable property in the country, or upon all the taxable property of the same kind in the country, the income tax itself was not embraced in the term because it was not laid upon all incomes. All individual incomes not exceeding four thousand dollars were wholly exempt, and also the entire incomes of various corporations without regard to their sources or amounts. In the mind of the Court the distinction was probably intended to be made between a general tax and a special or specific duty or excise, such as those imposed on particular occupations, on the earnings of particular kinds of business, and similar charges, which are paid in the first instance by those who are engaged in the occupation or business and cannot, therefore, be paid directly by the people at large.

In the argument on behalf of the Government, as reported in the case, it was contended that a tax was not direct and subject to the rule of apportionment unless it was laid "upon all real property, or at least upon all property;" and in its opinion the Court quoted from Mr. Hamilton's argument in the *Hylton* case, in which he said:

"The following are presumed to be the only direct taxes: Capitation or poll taxes.

Taxes on lands or buildings. General assessments, whether on the whole property of the individuals or on their whole real estate; all else must of necessity be considered as indirect taxes."

We do not understand that the Court approved the whole of Mr. Hamilton's definition, for all it said upon that subject was that :

" He gives, however, it appears to us, a definition which covers the question before us. A tax upon one's whole income is a tax upon the annual receipts from his whole property, and, as such, falls within the same class as a tax upon that property, and is a direct tax in the meaning of the Constitution."

And further on, in the course of the opinion, the Court said :

" In *Bank of Toronto vs. Lambe*, L. R., 12 App. Cas., 535, the Privy Council discussing the same subject, in dealing with the argument, much pressed at the bar, that a tax to be strictly direct must be general, said that they had no hesitation in rejecting it for legal purposes. ' It would deny the character of a direct tax to the income tax to this country, which is always spoken of as such, and is generally looked upon as a direct tax of the most obvious kind; and it would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature.' "

It is quite clear that Mr. Hamilton's definition, whether wholly correct or not, did cover the question then before the Court, and it is equally clear that it covers the question now presented, for although the tax in controversy, like the one on incomes, is not imposed on all the personal property of all the people, it is imposed upon all the personal property of every decedent's estate to which the act applies.

We think, however, that, according to the definitions given by the authorities, a tax upon a single article is direct if its payment is compulsory and the charge falls primarily and ultimately upon the owner of the property. In every case embraced in the provisions of this act the tax is laid upon personal property of all kinds; upon goods and chattels, money in hand or on deposit, live-stock, bonds, mortgages, promissory notes and choses in action of every description; and, in short, upon everything of value, except real estate, which can be used or sold for the payment of legacies and distributive shares. And, if real estate is sold to raise money for the payment of legacies or shares, the proceeds of the sale are taxed, because such proceeds are held in charge or trust for the purposes specified in the statute.

On the first hearing of the case last cited the Court stated the rule by which it was to be determined whether a tax was direct or indirect, as follows :

“ Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes ; but a tax upon property holders in respect to their estate, whether real or personal, or of the income yielded by such estate, and the payment of which cannot be avoided, are direct taxes.”

It is scarcely ever possible to determine in advance with absolute certainty whether a particular tax will or will not be primarily and ultimately paid, in whole or in part, by the owner of the thing taxed ; but it is ordinarily not very difficult to ascertain the intention of the law, or to discover what its practical operation is upon the people and their property. Even a tax imposed upon real estate according to its valuation or assessment, may possibly be wholly or partially shifted by an increase of rental, and so a capitation tax may be partially or wholly recouped by an increase of the charges for personal services ; but this possibility does not prevent

them from being direct taxes within the meaning of the Constitution.

Independently of the historical arguments, all of which sustain our contention that this is a direct tax, the true legal and economic tests seem to be (1) what was the intention of the law-making power as to the incidence of the tax, and (2) what is the practical operation of the law as administered? In the cases of our ordinary duties, imposts and excises, the purpose of Congress that they shall ultimately fall, in whole or in part, upon the consumers of the articles, or upon the immediate customers and patrons of those who primarily pay them, is quite clear; and it is also clear that the larger part, if not all, of such duties, imports and excises are, in fact, finally paid by others than those from whom the Government itself receives them.

In the cases of excises upon tobacco, malt liquors and other articles, where the duty is imposed upon the property itself, payment is required only when it is sold or removed for sale or consumption; and in the case of distilled spirits, which is the only one in which the duty may be collected before sale

or removal for sale or consumption, the law provides expressly that if the property should be lost or destroyed before payment, without the fault or neglect of the owner, the excise shall be remitted, and if so lost or destroyed after payment, and before it reaches the consumer, it shall, upon proper application, be refunded, thus showing on the face of the statutes imposing the excises that the purpose was to charge the purchasers or consumers only. The stamp duties, the imposts on imported goods, the duties and excises imposed upon certain classes of occupations and business, and upon the receipts or earnings of banks, insurance companies and other corporations, are all of the same character. They were intended to be, and are, wholly or partially shifted upon the community at large, although paid in the first instance by the several classes designated in the statute.

But the tax involved in these cases, whether it is a tax on the property or a tax on the privilege of disposing of property, or of receiving it by will or inheritance, is paid primarily and ultimately out of the personal estate left by the decedent, and its payment is not voluntary but compulsory. The tax is laid upon the property

itself, or upon the privilege, and in either case it is taken directly out of the property while it remains in the hands of the administrator, executor or trustee. If the legacy or distributive share consists of money it is paid to the Government and deducted from the amount and value of the estate; and, if it consists of specific personal property, so much of it as may be necessary to raise the amount of the tax must be sold or otherwise disposed of for that purpose, thus diminishing the amount and value of the estate to that extent. And even if the legatee or distributee should procure possession of his part of the property before payment of the tax, there is a lien upon it not only for its own proportion of the tax, but for all the tax, which the collector is directed by the statute to enforce by appropriate judicial proceedings. In fact, the payment of the tax could not be avoided, even by a refusal of the legatee or distributee to take the money or the property, for the estate must go to somebody, and the tax must be paid before any one except the husband or wife can take it. No tax can be more compulsory than this.

There is nothing in this statute, or in the character of the tax, or in the manner of its

collection, conducing to show that Congress intended or supposed any part of it would be ultimately paid by others than the owners of the property upon which it was imposed; nor can it in fact be shifted from the parties who primarily pay it so as to become a charge or burden upon any other person, or upon the property of any other person. Its payment is exacted from the whole estate held for the satisfaction of legacies and distributive shares, and the amount and value of the whole estate, except the shares of the surviving husband or wife, are necessarily and immediately diminished to the full extent of the tax, so that some of the beneficiaries under the will, or under the law, must receive less money or property, as the case may be, than would otherwise have been the case. No part of the tax can possibly be added to the actual or salable value of the property remaining after the payment, nor is there any method by which any part of it can be recouped by the use of the property. It is compulsory and direct according to every rational view that can be taken of it, and was intended to be so, for the purpose clearly was that the largest proportion of the burdens imposed should fall upon the most

wealthy estates. That purpose could not be accomplished if the tax ultimately fell upon others than the owners of the property at the time of its primary payment.

IV.

If this is not a direct tax, it is a duty or excise; and, by reason of the unequal exemptions, arbitrary and unreasonable classifications, and the progressive rates imposed upon the things taxed, is not uniform throughout the United States, as required by the Constitution, and is, therefore, void. The exemption of all the property taken out of the estate by the surviving husband or wife, without regard to its amount or value, and the exemption of all the property taken out of estates where the whole personal property held in charge or trust for the payment of legacies and distributive shares does not exceed ten thousand dollars in value, together with the taxation of every part of the property of the same kind taken out of estates exceeding that amount in value, are features of the statute amply sufficient of themselves to condemn it, if it is held to impose a duty or excise. Saying nothing of the parts taken by husbands and wives,

the total values of which cannot be even approximately estimated, the exemption of all property taken out of estates whose personal property does not exceed ten thousand dollars in value releases from all possibility of taxation, under this act, at least ninety-nine per cent. of all the personal estates of decedents in the United States, and places the whole burden of the tax upon the remaining one per cent.

We know, from common observation, that very few individuals, even in the most wealthy communities, own personal property exceeding ten thousand dollars in value, and that there are extensive regions in the country, containing hundreds of thousands of people, where scarcely a single one owning that amount could be found. All lands and houses, and every species of property classified as real estate, are by the terms of the act, excluded from the computation, and we are quite sure that we have underestimated the amount in the statement that ninety-nine per cent. of the property of the estates in the country is exempt from this tax.

According to the census of 1890 the true value of all the personal property in the United States was \$25,492,546,864, and the total popu-

lation was 62,622,250, making the value \$407.08 *per capita* at that time. If we assume that the value has increased fifty per cent. *per capita* since that time, which is a most extravagant estimate, it would now be only \$610.62. Although the personal property in the country is not equally distributed among the people, it is not at all probable that as much as one per cent. [766,990] of the total population could be selected, each one of whom owns more than \$10,000 in value. The enormous aggregation of personal property owned by corporations of all kinds, such as railroad companies, banks, insurance companies, trust companies, street-car companies, manufacturing and commercial companies and others, is all included in our statement of total value, but all of it escapes taxation under this act.

If a sound public policy requires that the wealthy owners of property, or the beneficiaries of wealthy estates, shall be taxed at higher rates than others, it is clear, not only that the personal property belonging to corporations should be reached by the law, but that real estate, the true value of which in 1890 was \$39,544,544,333, should also be included.

There are no public considerations what-

ever to justify these unusual and unreasonable exemptions. They are purely arbitrary and grossly unjust. But, having made these extraordinary exemptions and omissions, the act proceeds to make arbitrary classifications and to impose upon the things subject to taxation under its provisions, rates of duty so unequal and unjust that it is impossible to see upon what rule or principle of public policy or constitutional law they are to be defended.

The parts taken out of the estates as legacies and distributive shares are not classified as such in any way, but the beneficiaries are classified according to the degrees of their relationship to the decedent, and the estates out of which the shares are taken are classified according to their value. The initial rates of taxation upon the several parts of the property are varied according to the degrees of relationship; but the progressions in the rates are regulated entirely by the value of the whole personal property out of which the several parts are taken. The act creates seven classes of beneficiaries :

1. The surviving husband or wife of the decedent, whose parts of the estate are wholly exempt.

2. All legatees and distributees, without regard to relationship, who receive shares out of estates not exceeding ten thousand dollars in value, whose shares of the property are also wholly exempt.

3. Lineal descendants and lineal ancestors, and the brothers and sisters of the decedent, whose shares of the property are taxed progressively according to the value of the whole personal estate out of which they are taken.

4. The descendants of brothers and sisters of the decedent, whose shares of the property are taxed progressively according to the value of the whole personal estate out of which they are taken.

5. The brothers and sisters of the father or mother of the decedent, and the descendants of such brothers and sisters, whose shares of the property are taxed progressively according to the value of the whole personal estate out of which they are taken.

6. The brothers and sisters of the grandfather or grandmother of the decedent, and the descendants of such brothers and sisters, whose shares of the property are taxed progressively according to the value of the whole personal estate out of which they are taken ; and

7. All other collaterals, all strangers in blood, and all bodies politic and corporate, whose shares of the property are taxed progressively according to the value of the whole personal estate out of which they are taken.

The personal estates of decedents are divided by the act into six classes, as follows :

1. Estates not exceeding ten thousand dollars in actual value, which are wholly exempt.

2. Estates valued at more than ten thousand dollars, but not exceeding twenty-five thousand dollars, the whole amount of which is taxed.

3. Estates valued at more than twenty-five thousand dollars, but not exceeding one hundred thousand dollars, the whole amount of which is taxed.

4. Estates valued at more than one hundred thousand dollars, but not exceeding five hundred thousand dollars, the whole amount of which is taxed.

5. Estates valued at more than five hundred thousand dollars, but not exceeding one million dollars, the whole amount of which is taxed.

6. Estates exceeding one million dollars without regard to their values in excess of that amount, the whole amount of which is taxed.

It will be seen, therefore, that, if the whole personal estate held in charge or trust to pay legacies or distributive shares does not exceed ten thousand dollars in value, no part of it is taxed, but if it exceeds that valuation no part of it is exempt. The part taken by a stranger in blood who receives the whole property of a decedent leaving an estate not exceeding ten thousand dollars in value, is not required to pay any tax; but the part of the property taken by a son or daughter of the decedent who receives the same amount out of an estate exceeding one million dollars in value, is subject to a tax of two and a quarter per cent. Lineal descendants of two decedents who leave personal estates of different values, may receive shares of exactly the same amount, but they will be taxed at wholly different rates; and the same is true of the constituents of each of the other classes created by the act. There is no semblance of uniformity in the taxation, either upon the property as a whole or upon the several parts taken out of it by the beneficiaries, or upon the privilege. An almost infinite variety of illustrations might be given to show the utter lack of uniformity in the tax or duty, but this is unneces-

sary, as the practical operation of the statute will be demonstrated by the following statements based upon a legacy or distributive share of ten thousand dollars, and exhibiting the different rates of taxation imposed upon the same amount of money, and upon the same kind and amount of property, held in charge or trust for its payment, and bequeathed to or inherited by members of the same class.

LINEAL ISSUE, LINEAL ASCENDANT, OR BROTHER
OR SISTER.

Value of personal estate.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
\$10,000 00	\$10,000 00	None.	0 %	\$0 00
10,500 00	10,000 00	\$ 10,000 00	0 $\frac{3}{4}$ %	75 00
25,000 00	10,000 00	10,000 00	0 $\frac{3}{4}$ %	75 00
25,500 00	10,000 00	10,000 00	1 $\frac{1}{8}$ %	112 50
100,000 00	10,000 00	10,000 00	1 $\frac{1}{8}$ %	112 50
100,500 00	10,000 00	10,000 00	1 $\frac{1}{2}$ %	150 00
500,000 00	10,000 00	10,000 00	1 $\frac{1}{2}$ %	150 00
500,500 00	10,000 00	10,000 00	1 $\frac{3}{8}$ %	187 50
1,000,000 00	10,000 00	10,000 00	1 $\frac{3}{8}$ %	187 50
1,500,000 00	10,000 00	10,000 00	2 $\frac{1}{4}$ %	225 00
5,000,000 00	10,000 00	10,000 00	2 $\frac{1}{4}$ %	225 00

DESCENDANT OF A BROTHER OR SISTER.

Value of personal estate.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
\$10,000 00	\$10,000 00	None.	0 %	0 00
10,500 00	10,000 00	\$10,000 00	1½ %	\$150 00
25,000 00	10,000 00	10,000 00	1½ %	150 00
25,500 00	10,000 00	10,000 00	2¼ %	225 00
100,000 00	10,000 00	10,000 00	2¼ %	225 00
100,500 00	10,000 00	10,000 00	3 %	300 00
500,000 00	10,000 00	10,000 00	3 %	300 00
500,500 00	10,000 00	10,000 00	3¾ %	375 00
1,000,000 00	10,000 00	10,000 00	3¾ %	375 00
1,500,000 00	10,000 00	10,000 00	4½ %	450 00
5,000,000 00	10,000 00	10,000 00	4½ %	450 00

BROTHER OR SISTER, OR DESCENDANT OF
BROTHER OR SISTER, OF THE FATHER OR
MOTHER OF DECEDENT.

Value of personal estate.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
\$10,000 00	\$10,000 00	None.	0 %	\$00 00
10,500 00	10,000 00	\$10,000 00	3 %	300 00
25,000 00	10,000 00	10,000 00	3 %	300 00
25,500 00	10,000 00	10,000 00	4½ %	450 00
100,000 00	10,000 00	10,000 00	4½ %	450 00
100,500 00	10,000 00	10,000 00	6 %	600 00
500,000 00	10,000 00	10,000 00	6 %	600 00
500,500 00	10,000 00	10,000 00	7½ %	750 00
1,000,000 00	10,000 00	10,000 00	7½ %	750 00
1,500,000 00	10,000 00	10,000 00	9 %	900 00
5,000,000 00	10,000 00	10,000 00	9 %	900 00

BROTHER OR SISTER, OR DESCENDANT OF
BROTHER OR SISTER, OF THE GRAND-
FATHER OR GRANDMOTHER OF DECEDENT.

Value of personal estate.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
\$10,000 00	\$10,000 00	\$None.	0%	\$0 00
10,500 00	10,000 00	10,000 00	4%	400 00
25,000 00	10,000 00	10,000 00	4%	400 00
25,500 00	10,000 00	10,000 00	6%	600 00
100,000 00	10,000 00	10,000 00	6%	600 00
100,500 00	10,000 00	10,000 00	8%	800 00
500,000 00	10,000 00	10,000 00	8%	800 00
500,500 00	10,000 00	10,000 00	10%	1,000 00
1,000,000 00	10,000 00	10,000 00	10%	1,000 00
1,500,000 00	10,000 00	10,000 00	12%	1,200 00
5,000,000 00	10,000 00	10,000 00	12%	1,200 00

OTHER COLLATERALS, STRANGERS IN BLOOD,
AND BODIES POLITIC AND CORPORATE.

Value of Personal Estate.	Clear Value of Legacy.	Amount Taxable.	Rate for Every \$100.	Amount of Tax.
\$10,000 00	\$10,000 00	None.	0.00	\$0 00
10,500 00	10,000 00	\$10,000 00	5%	500 00
25,000 00	10,000 00	10,000 00	5%	500 00
25,500 00	10,000 00	10,000 00	7½%	750 00
100,000 00	10,000 00	10,000 00	7½%	750 00
100,500 00	10,000 00	10,000 00	10%	1,000 00
500,000 00	10,000 00	10,000 00	10%	1,000 00
500,500 00	10,000 00	10,000 00	12½%	1,250 00
1,000,000 00	10,000 00	10,000 00	12½%	1,250 00
1,500,000 00	10,000 00	10,000 00	15%	1,500 00
5,000,000 00	10,000 00	10,000 00	15%	1,500 00

The power of Congress, in proper cases, to make classifications for the purposes of taxation is not denied, but it must classify the things taxed, not the people who own them; and in classifying the things taxed it must group together things which bear an actual relation to each other, and which, on account of their character or use, are really distinguishable from all the things included in the other groups or classes. But neither Congress nor the States can make classifications, however proper they may be, and then impose different rates of taxation upon the constituents of the same class, as is done in this act.

But from what source is it claimed that Congress derives the power to classify the beneficiaries of estates disposed of by last will and testament, or inherited, under the laws of a State, and to impose different rates of taxation, or different conditions, even upon different classes, according to their degrees of relationship to a decedent? According to the decisions of this Court already cited, no one has a natural right to dispose of property by will, and consequently lineal descendants, lineal ascendants, collaterals of any degree, and strangers in blood,

all derive their right to take legacies under a will, or to inherit the property of a deceased owner from the State; and, this being so, it follows necessarily that, in the absence of a State statute conferring these rights and privileges, all persons, whether related in any way to the decedent or not, stand upon a footing of perfect equality in these respects. The grant to each of them by the State is, according to the decisions, wholly gratuitous and of the same nature and value in each case, and, therefore, in a legal sense, there is no more justification for the imposition by Congress of a higher rate of taxation, or a more onerous condition, upon the property taken by a stranger, or upon his privilege to take it, than there is for the imposition of a higher rate of taxation, or a more onerous condition, upon property taken by a lineal descendant, or upon his privilege to take it. Whether there shall be a higher rate of taxation, or a more onerous condition, imposed upon the one class than is imposed upon the other, is a question of internal policy to be decided by the State for itself; and, if it has not seen proper to make distinctions in these respects, Congress cannot usurp power over the subject and divide the beneficiaries of

State legislation into classes and make discriminations between them. So far as we have been able to discover, no State in the Union has made any such classifications as are made in this act. No State has grouped together in its laws concerning last wills and testaments, or regulating inheritances, "the lineal issue or lineal ancestor, or brother or sister of the person who died," or has grouped together any degree of collateral relations of the decedent and "strangers in blood and bodies politic or corporate," as is done by this statute. The States, in regulating these subjects, make no distinctions between classes in the right to make wills, or to take legacies, or inherit property, either on account of the value of the whole estate or the value of the legacy or share, and, while they do make certain distinctions and give certain preferences in conferring the right to take by inheritance, they are very different from those Congress has attempted to make for the purpose of taxing the property or the privilege of disposing of or receiving it. If the estate, or legacy, or distributable share, is the same in each case, the privilege of disposing of or receiving it is of the same nature and value in each case, without regard to the degree of

relationship existing between the decedent and the beneficiaries, and, when Congress legislates upon this subject, the same rate of taxation should be placed upon each. On the other hand, if the estate, or the legacy, or distributive share, is greater in one case than in another, the privilege of disposing of or receiving it is greater also, and proportional taxation will compel all to pay according to the actual value of the property disposed of or received, or the actual value of the privilege enjoyed; thus the largest amount of taxation would fall justly and uniformly upon the things of most value. But Congress has undertaken in this act to make arbitrary classifications based on relationship and the value of the whole estate out of which the shares are taken, not for the purpose of imposing taxes or conditions in proportion to the value of the shares, but for the purpose of taxing those taken out of the greater estates at higher rates than those taken out of the smaller ones, and by this means discriminating between different classes of estates and beneficiaries, and also between beneficiaries who are of the same class, as is conclusively shown by the statements on pages 63, 64 and 65 of this brief.

According to the decisions, the State may declare that no property shall be disposed of by will, or that a stranger in blood, or any particular class of relatives, shall not be capable of taking a legacy or inheritance, and that the whole estate shall descend to the lineal issue, or to such other persons as the Legislature may designate, and it may, therefore, classify the beneficiaries in any manner it chooses; but Congress has no power to do any of these things. The only limitation so far recognized by this Court on the power of the States over this subject is, that while they may make classifications and impose different rates of taxation upon the property taken by the different classes, or different conditions upon the exercise of the privilege by the different classes, the same rates and conditions must be imposed upon all the property and privileges of the same class. The source of the power of the States to make such classifications and to discriminate between the several classes in imposing taxes or conditions, has been fully explained by this Court, as we have already seen; but the power of Congress to legislate upon the subject, if it has any, is of a wholly different nature from that exercised by the authority that confers the

right or privilege, and must, therefore, rest upon a different foundation.

Neither Congress nor a State can, for the purposes of taxation, separate property or privileges of the same kind into different classes, and discriminate in the rates upon them merely on account of differences in the social or pecuniary condition of the owners. An attempt to do so is not classification ; and the increased rates exacted from a part of the people by such a proceeding is not taxation, but spoliation. No matter whether the right of the Government to impose taxes upon property for its own support is to be sustained upon the ground of benefits conferred upon the citizen, or the cost of the protection afforded him, or his ability to pay, proportional rates according to the values of the things taxed, without regard to their ownership, constitutes the only means by which the burden can be, even approximately, distributed without violating the rule of uniformity and equality in taxation, which is generally admitted to be fundamental. Unless it is the right and the duty of the Government to equalize the fortunes of the people, or, at least, to prevent great inequalities in fortunes, progressive taxation can have no place in our

legislation. Whatever its advocates may say to the contrary, it is a practical recognition of the vital principle of state socialism, and, logically, it cannot be so limited or restricted as to stop short of that result. When progressive taxation is resorted to it is done for the sole purpose of avoiding uniformity and equality by subjecting the property of a part of the people to more than its just share of the public burdens, and it is not only a violation of the express provisions of the Constitution, but a repudiation of the principle of equality upon which our political institutions are founded.

We maintain that this duty or excise, if it is a duty or excise, is not uniform in the meaning of the Constitution, (1) because of the exemptions made in the statute in favor of the surviving husband and wife, and in favor of all estates, or of the beneficiaries of all estates, not exceeding ten thousand dollars in value; (2) because property of the value of ten thousand dollars is not exempt also out of all taxable estates, or all legacies and distributive shares, exceeding that value; (3) because of the arbitrary and unreasonable classifications; (4) because of the discriminations made between the constituents of the same classes, and

(5) because of the unequal rates imposed upon property or privileges of the same kind and value. While this want of uniformity will probably not be seriously disputed, it will doubtless be contended in support of the statute, that the Constitution does not require uniformity among taxpayers, but simply that the rule of taxation, whatever it may be, shall be the same throughout the United States ; or, in other words, that a duty, impost or excise may be uniform throughout the United States, although it is not uniform at a single place in the United States. But the Constitution does not provide merely that the *rule* shall be uniform in all the States, or shall be the same in all the States, but that all *duties*, *imposts* and *excises*—that is, all indirect taxation—shall be uniform throughout the United States. The taxation itself must be uniform, and the words “throughout the United States ” were used to designate the territory within which it should be uniform ; and they apply to the District of Columbia and the Territories as well as to the several States (*Loughborough vs. Blake*, 5 Wheat., 317). The meaning is the same as if it was provided in the Constitution of a State that taxation should be uniform throughout the State ; that is, everywhere within the State.

The United States constitute one political community, and embrace a defined area which, it is true, includes many States and some Territories; but, in this clause, the Constitution does not refer to separate States or Territories, but to the whole area over which the jurisdiction of the general Government extends. Whenever the Constitution refers to the several States, as such, it is done in appropriate language. The instances in which it speaks of "the States," and the "several States," as separate and distinct territorial and political bodies, are so numerous that it would be tedious to mention them. There is a wide difference between a requirement that a law, or a regulation, or a tax, shall be uniform as between the States, and a requirement that it shall be uniform throughout the United States. When, for instance, it was intended to provide simply that a law or regulation should be the same in all the States, without regard to the uniformity or equality of its operation or effect upon the subjects to which it applied, it was declared that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to, or from, one State be

obliged to enter, clear, or pay duties in another " (Art. 1, Sec. 5, Clause 6). By the terms of this clause it is not required that the regulations adopted shall bear equally and uniformly upon commerce, or the subjects of commerce, at all the ports throughout the United States, or at any one port in the United States, but if they are the same in the ports of all the States the constitutional provision is not violated. It is now argued by some that the same construction and effect must be given to another constitutional provision, which is altogether different in its terms, and in its objects also, as we understand it—that is, it is now argued that Section 8, Article 1, should be construed as if it read : " But in the imposition of duties, imposts and excises no preference shall be given to the people of one State over those of another ; nor shall different duties, imposts or excises be levied or collected in one State than in another." If such a clause as this were substituted for the one actually contained in the constitution it might well be argued that, so far as the constitutional inhibition applied to the question, Congress might impose higher rates upon small estates, or small legacies and distributive shares, than it imposed

on large ones, or *vice versa*, provided the same rule was applied in all the States. Whether unjust discriminations of this character would not be such a perversion and abuse of the power of taxation, as it is understood under a government of equal rights and privileges, as to make the act void, is a different question. We submit that if the authors of the Constitution had simply intended to establish a rule of uniformity as between the States, leaving Congress free to make such discriminations in all other respects as it might choose, they would not have employed the phrase "uniform throughout the United States," but would have made their meaning clear by the use of appropriate language.

In the "Head Money Cases," 112 U. S., 580, the Court decided that the act imposing a duty of fifty cents per head upon passengers brought in vessels from a foreign port to a port in the United States, was not passed in the exercise of the power to lay and collect taxes, but under the authority to regulate commerce; and Mr. Justice MILLER, who delivered the opinion of the Court, said :

"It is said that the statute violates the

rule of uniformity and the provision of the Constitution that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another,' because it does not apply to passengers arriving in this country by railroad or other inland mode of conveyance. But the law applies to all *ports* alike, and evidently gives no preference to one over another, but is uniform in its operation in all ports in the United States."

But upon the proposition, urged by counsel, that the duty was imposed under the power to tax, the Court, after quoting the constitutional provision on that subject, said :

" In this view it is objected that the tax is not levied to provide for the common defense and general welfare of the United States, and that it is not uniform throughout the United States. The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. ' It shall be uniform throughout the United States. * * * The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike

in every port of the United States where such passengers can be landed."

The Constitution provides that Congress shall have power "to establish an uniform rule of naturalization; and uniform laws on the subject of bankruptcy throughout the United States" (Art. I, Sec. 8, clause 4). The meaning of this clause, so far as it relates to the subject of bankruptcy, was considered in *Sturgis vs. Crowninshield*, 4 Wheat., 122, and Chief-Justice MARSHALL said :

"The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to establish uniform laws on the subject throughout the United States."

In *Ogden vs. Saunders*, 12 Wheat., 213, Mr. Webster argued that the Constitution provided for two things :

"1. A uniform medium for the payment of debts. 2. A uniform manner of discharging debts, when they are to be discharged without payment."

Again, he said :

"We maintain: First, that the Constitution, by its grants and its prohibitions on

the States, has sought to establish one uniform standard of value or medium of payment. Second, that, by like means, it has endeavored to provide for one uniform mode of discharging debts, when they are to be discharged without payment."

Mr. Justice JOHNSON, who delivered one of the separate opinions in the case, neither approved nor condemned the construction put upon the Constitution by counsel, but said :

" Yet, on this subject the use of the term 'uniform,' instead of 'general,' may well raise a doubt whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union."

In construing this provision of the Constitution in *Re Deckert*, 2 Hughes, 183, Chief-Justice WAITE said :

" A bankrupt law, therefore, to be constitutional, must be uniform. Whatever rule it prescribes for one *it must prescribe for all. It must be uniform in its operations, not only within a State, but within and among all the States.*"

See, also, *Sweatt vs. Railroad Company*, 3 Clifford, 339.

It would not be a strained construction of that provision of the Constitution to hold that it

only required the law itself to be uniform in its operation throughout the United States, and not that the uniformity should exist as to the manner of discharging debtors, though it is scarcely to be supposed that it was intended to authorize legislation upon this subject which would enable one creditor to secure a discharge upon different conditions than those required in the case of another in the same situation. But, however this may be, the language of the two constitutional provisions is not the same, and the subjects to which they relate are very different ; and, therefore, even if discriminations could be constitutionally made between debtors in cases of bankruptcy, it would not by any means follow that they might also be made in the imposition of indirect taxes.

In *Loughborough vs. Blake*, 5 Wheat., 660, Chief-Justice MARSHALL said :

“ The eighth section of the first article gives Congress the ‘ power to lay and collect taxes, duties, imposts and excises ’ for the purposes therein mentioned. This grant is general, without limitation as to place. It, consequently, extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the

grant. These words are: 'but all duties, imposts and excises shall be uniform throughout the United States.' It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great Republic, which is composed of States and Territories. The District of Columbia, or the Territory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously coextensive with the power to lay and collect duties, imposts and excises, and since the latter extend throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States."

It will be observed that Chief-Justice MARSHALL did not say that the uniformity required by the

Constitution in the imposition of duties, imposts and excises, was required to exist merely as between, or among, the States and Territories and the District of Columbia ; but, with his usual accuracy of expression, he said that it must exist "*in the one*" as well as "*in the other.*"

In *United States v. Singer*, 15 Wall., 121, the Court said:

"The tax here is uniform in its operation; that is, it is assessed *equally* upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller, and a different rule for another, but the same rule for all alike."

In this opinion the Court distinctly recognized equality among taxpayers as an essential element of the uniformity required by the Constitution, for the excise in question was sustained upon the ground that it was not only the same wherever the subject was found, but that it was assessed "equally upon all manufacturers of spirits wherever they are."

This Court has had more than one occasion to pass upon questions involving the construction of State Constitutions upon the subject of taxation, and in every such case it has so interpreted

them as to protect the citizen against discriminations, although the constitutional provisions were by no means as plain in their requirements as the one now relied on. The Constitution of Michigan provides that :

“ The Legislature shall provide a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law.”

The Constitution of Ohio provides :

“ Laws shall be passed taxing by a uniform rule all monies, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property according to its true value in money.”

And the Constitution of Wisconsin provides :

“ The rule of taxation shall be uniform.”

In the case of *Pine Grove vs. Talcott*, 19 Wall. (86 U. S.), 666, the Court, referring to the Constitution of Michigan, said :

“ The eleventh clause of the same article declares that the Legislature shall provide a uniform rule of taxation, except as to property paying specific taxes, and that taxes shall be levied upon such property as shall

be prescribed by law. The object of this provision was to prevent unjust discriminations. It prevents property from being, classified, and taxed as classified by different rules. All kinds of property must be taxed uniformly or be entirely exempt. The uniformity must be co-extensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State ; if a county or city tax, throughout such county or city."

In *Gilman vs. Sheboygan*, 2 Black (67 U. S.) 510, the provision which we have quoted from the Constitution of Wisconsin came before this Court, and it was held that a statute of that State which imposed a tax upon real estate exclusively was void. The Court said :

" This tax was levied exclusively upon the real estate of the city. That was a discrimination in favor of the personal property. It was beyond the constitutional power of the Legislature to make any discrimination. Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property."

In *Exchange Bank of Columbus vs. Hines*, 3 Ohio St., 1, the Court said :

“ What is meant by the words ‘ taxing by a uniform rule ’ ? No words in the Constitution, perhaps, are more important than these, and, to accomplish the beneficial purposes intended, it is essential that they should be truly interpreted and correctly applied. ‘ Taxing ’ is required to be ‘ by a uniform rule ; ’ that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxation implies equality in the burden of taxation ; and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation.”

This decision was quoted from and approved by this Court in *Gilman vs. Sheboygan*. In all these cases the constitutional provision simply required that the *rule* of taxation should be uniform, and not, as is required by the Constitution of the United States, that the taxation itself should be uniform ; but this Court held that, under such provisions, no discriminations could be made, or, in other words, that a uniform rule necessarily implied uniformity and equality

in the taxation itself, and that it was not sufficient merely to apply the same rule throughout the State, whether it operated equally or unequally. The language of the constitutional provision upon which we rely in these cases is plain and explicit, and its purpose, we think, cannot be misunderstood. It was intended to assert and make permanent and effective throughout the United States, the principle that all taxes imposed by the general Government upon the property of the people, except direct taxes, which, for political reasons, were required to be apportioned among the States, should be equal and uniform everywhere within its jurisdiction. It asserted no new rule or principle, nor did it abrogate any old one. There is nothing in the language of the Constitution, or in the history of the times, to justify the conclusion that the men who framed it, or the States and people when it was ratified, intended to deprive themselves and their posterity of the protection afforded by the well-settled rule requiring uniformity and equality in taxation. In fact, there is no good reason to suppose that even direct taxes were not intended to be laid uniformly and equally in each State upon all the

property there subject to it, though the amount apportioned to each State out of the whole sum to be raised might require higher rates upon the same kind of property in one State than in another.

But having, for reasons and considerations of a political character, which were deemed sufficient, provided for the apportionment of direct taxes, without expressly requiring uniformity in the rates within each State, the Constitution then provided for the imposition of "duties, imposts and excises," which include all other taxes, and by the use of a term, the meaning of which, when applied to the subject of taxation, was then well understood by lawyers, legislators, political economists and writers on the science of government, expressly required them to be "uniform" throughout the United States. Uniformity and inequality are incompatible terms, and consequently uniformity throughout the United States does not permit inequality anywhere in the United States. The word "uniform" was undoubtedly used in its ordinary sense, as expounded by the familiar authorities on the subject, and as practically construed in the legislation of this and other enlightened countries at that time, and,

unless its meaning is qualified or restricted by the phrase "throughout the United States," there can be no ground for controversy concerning the purpose for which it was employed in the Constitution.

We have argued that these words do not constitute a modification or limitation of the rule as previously understood, but were used only for the purpose of designating the territory or jurisdiction within which the uniformity was required to exist; and it must be admitted, we think, that, if this is not the correct construction, the Constitution affords but little, if any, protection against unjust discriminations in taxation upon the property or earnings of the people in any State.

It has been suggested that, if the construction of the Constitution for which we are contending is correct, the uniformity required by that instrument in the imposition of duties, imposts and excises does not exist when *ad valorem* rates of duty are imposed upon some imported goods, and specific rates, without regard to their value, are imposed upon others. This, if true, would not alter the meaning of the Constitution; but we fail to see that such a suggestion, in the form in

which it is made, has any bearing upon the question. In laying indirect taxes Congress has the right to classify the things taxed, and whether such taxation is or is not uniform, in the case supposed, depends entirely upon the character of the classification. It may tax one class of goods at one rate and another at a different rate, or one class at an *ad valorem* rate and another at a specific rate; but if it should undertake to tax the same article at different rates, or by such different methods as to make the imposition unequal, the rule of uniformity, as we interpret it, would be violated.

It is the province of the Court to consider only the question of power. If it decides that the authority to make discriminations in taxation exists, the manner in which it shall be exercised must be finally and conclusively determined by the legislative branch of the Government, and it may, if it chooses, reverse the policy of this act and discriminate in favor of the rich and against the poor, as was done by France in the Fourteenth century, when the purpose was to exempt the wealthy nobility from their just share of the public burdens, and afterwards by some of the towns in Germany, for the purpose of favoring

the aristocratic and feudal classes. We do not believe that any such dangerous and arbitrary power can be found lurking anywhere in our Constitutions, State or Federal, and we respectfully but earnestly insist that it shall be repudiated and condemned by the judgment of the Court in these cases.

V.

If we accept such a construction of the Constitution as would require duties, imposts and excises to be geographically uniform only, this act does not conform to it. The tax is imposed only upon personal estates, or upon legacies and distributive shares, "passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any *State or Territory*," and it is provided that the receipt for the tax, given by the collector or deputy collector, shall be sufficient evidence to entitle the administrator, executor or trustee to be credited for the amount "by any tribunal which, by the laws of any *State or Territory*, is, or may be, empowered to decide and settle the accounts of executors and administrators." These are the only provisions in the act showing

the geographical area within which the tax was to be imposed and collected. The act of 1864, from which these clauses were taken, provided that :

“Whenever the word ‘State’ is used in this act it shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act” (13 Stat., 306).

Section 3140 of the Revised Statutes of the United States provides that “the word ‘State,’ when used in this title, shall be construed to include the Territories and the District of Columbia when such construction is necessary to carry out its provisions.” The title is “Internal Revenue,” and includes the sections from 3140 to 3465. No such provisions as we have quoted are contained in the act imposing the tax in controversy, and we think the inference is clear that if it had been intended to embrace the District of Columbia, it would have been expressly mentioned, or some general clause would have been inserted to indicate that purpose. The only reference in the act to the former laws on the subject of taxation is contained in Section 31, which

provides "that all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, are hereby made applicable to this act;" and it is evident that this cannot be so construed as to affect the question now presented.

Property in the District of Columbia is not disposed of by will or inheritance, or received under wills or by inheritance, under the laws of a State or Territory. The District of Columbia is neither a State nor a Territory, and it cannot become a State, for under the Constitution it is subject to the exclusive legislative jurisdiction of Congress, and this jurisdiction cannot be abdicated (*Stoutenburgh vs. Hennick*, 129 U. S., 141; *Hepburn & Dundas vs. Ellzey*, 2 Cranch, 452). Within its limits, as now defined, Congress possesses all the legislative power formerly possessed by the State of Maryland, and, in addition, all the powers delegated by the Constitution of the United States, and in their exercise it does not treat the District as either a State or a Territory. Its relations to Congress, and the character of its government, are wholly different from those of the States and organized Territories; and, if not mentioned in a statute relating to a special subject, it is

not included; and this is necessarily so when, as in this case, the States and Territories are expressly included and the District is omitted. "*Expressio unius est exclusio alterius*" is a maxim of universal application in the construction of statutes and constitutions, and the enumeration of the parts of the country to which the act applies necessarily excludes every other part. Another rule, equally applicable to this case, is that when a constitution or a statute is expressed in plain and unambiguous terms, whether they are general or limited, it must be taken to mean just what it says (*Lake County vs. Rollins*, 130 U. S., 662; *St. Paul, M. & M. Railroad Company vs. Phelps*, 137 U. S., 528).

Or, as was said by this Court in the case of *Thornly vs. United States*, 113 U. S., 310, "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction;" and, although it would seem that no authority was necessary to support so plain a proposition, the Court cited numerous cases in which it had been stated and approved.

The provisions of a statute imposing taxes

upon the property of the people cannot, we think, be so construed as to extend them to territory to which they plainly do not apply, nor can they be made to embrace subjects of taxation not plainly designated. Such a rule of construction is necessary in order to preserve the distinction between legislative and judicial power, as well as for the protection of the rights of property, and it cannot be properly disregarded upon the assumption that the territory omitted, or the subjects omitted, would have been included if the attention of the Legislature had been called to them. The statute must be construed and administered as it was enacted, and if there are errors or omissions they must be cured by the legislative authority, as was done by the direct-tax act of February 27, 1815, extending that tax to the District of Columbia, which had been omitted by the act of January 9, 1815 (3 Stat., 164; *Ibid.*, 216).

The constitutionality of this act, extending the direct tax to the District, was passed upon by this Court in *Loughborough vs. Blake*, 5 Wheat., 660, heretofore cited and quoted from.

Could the collection of this tax be lawfully enforced in the District? Can this Court inter-

polate the words "District of Columbia" into the act, and thereby subject the estates of decedents in the District to the tax which it imposes? If the act contained any language showing a purpose to impose the tax on property in the District, the Court might properly so construe it as to disregard the accidental omission of the words "District of Columbia" in a particular part of it, if it believed they had been accidentally omitted; but when, as in this instance, terms are twice employed which are inconsistent with it, such a construction would result in the imposition of taxation by the Court itself. Suppose the act had used the words "States and District of Columbia" in the provision designating the estates to be taxed and, again in the provision concerning the effect of the collector's receipt, could it possibly have been so construed as to include the Territories? Certainly not, unless the Court can make a tax law for those parts of the country.

It is scarcely necessary to cite authority to show that laws imposing taxes are to be strictly construed, except such parts of them as are remedial in their nature. The English cases on this subject are clear and consistent. In War-

rington vs. Furber, 8 East., 242, Lord ELLENBOROUGH said:

“ Where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception confining the operation of the duty.”

And in Williams vs. Sangar, 10 East., 66, he said :

“ In the construction of these tax acts we must look at the strict words, however we may sometimes lament the generality of the expressions used in them ; but we must construe those words according to their plain meaning with reference to the subject matter.”

In Denn vs. Diamond, 4 B. & C., 224, the Court said :

“ It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language.”

In Tompkins vs. Ashby, 6 B. & C., 541, it was said :

“ Acts of Parliament imposing duties are to be so construed as not to make any instrument liable to them unless manifestly within the intention of the legislation.”

And in *Doe vs. Smith*, 8 Bing., 142, the Court said :

“ As all stamp acts, being a burden on the subject, must be clearly expressed wherever they impose the burden, I should say that, even if there were doubt, we should take the smaller sum.”

In *Wroughton vs. Turtle*, 11 Mees. & W., 561, the Court said :

“ It is a well-settled rule of law that every charge on the subject must be imposed by clear and unambiguous words.”

This rule of construction has been repeated and approved in many other cases in England. See *Marquis of Chandos vs. Commissioner of Inland Revenue*, 6 Exch. 464, and *Gurr vs. Scudds*, 11 Exch., 190, in which it was said :

“ If there is any doubt as to the meaning of the stamp act, it ought to be construed in favor of the subject, because a tax cannot be imposed without clear and express words for that purpose.”

“ It is a well-settled rule of law,” says *Dwaris on Statutes*, 742, “ that every charge upon the subject must be imposed by clear and unambiguous language. Acts of Parliament which impose a duty upon the public will be critically

construed with reference to the particular language in which they are expressed. When there is any ambiguity found, the construction must be in favor of the public, because it is a general rule that, when the public are to be charged with a burden, the intention of the Legislature to impose that burden must be explicitly and distinctly shown."

We concede that provisions contained in revenue laws for the purpose of prohibiting and punishing the perpetration of frauds upon the Government in the collection of its taxes, do not come within the rule for which we are now contending, but are to be liberally construed in order to accomplish the objects intended. See

Taylor vs. U. S., 3 How., 197.

Cliquot Champagne Case, 8 Wall.,
114.

U. S. vs. Hobson, 10 Wall., 395.

Smythe vs. Fiske, 23 Wall., 374.

Judge COOLEY, in a note referring to the case of Taylor vs. United States, cited above, says:

"The opinion in this last case was given by Mr. Justice STORY, and the language made use of, which consists largely in a quotation from the opinion given in the lower Court, does not express his own views

so clearly as was customary with that learned judge. What is manifest in his opinion is that the point was not regarded as of importance in that case, the meaning of the statute being plain; and while the distinction pointed out by the lower Court between penal and remedial laws is approved, and shown to be in accordance with the authorities, it is not clear that the general remarks of the judge were intended to go farther. It would have been a remarkable circumstance if Mr. Justice STORY had overruled his own opinion, delivered so recently that, at that time, his son [and reporter] had not issued the volume containing it" (Cooley on Taxation, 205).

The opinion last referred to in this extract was given in the case of *United States vs. Wigglesworth*, 2 Story, 369, in which Mr. Justice STORY said :

"In the first place, it is, as I conceive, a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government, and in

favor of the subjects or citizens, because burdens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import. Revenue statutes are in no just sense remedial laws, or laws founded upon any permanent public policy, and, therefore, are not to be liberally construed."

It was said, also, by Mr. Justice NELSON, in *Powers vs. Barney*, 5 Blatch. 202, that duties "are never imposed upon the citizen upon vague or doubtful interpretations;" and in *U. S. vs. Watts*, 1 Bond, 580, it was said:

"The revenue laws are not to be so construed as to extend their meaning beyond the clear import of the words used."

In view of the numerous decisions upon this subject, and the sound reasons upon which they are based, we cannot see how it is possible to hold that the act involved in these cases must be so construed as to impose this onerous and unequal tax upon the property of decedents in the District of Columbia; and, if not so construed, it is invalid, no matter what meaning may be attached to the provision of the Constitution requiring all duties, imposts and excises to be "uniform throughout the United States."

Although a considerable part of this brief has been devoted to an examination of the particular provisions of the statute in order to arrive at its true construction, we do not regard that question as material in determining its constitutionality, for, according to any interpretation that can be given to it, the tax must be either direct or indirect, and, as it is neither apportioned nor uniform, it necessarily fails to comply with either of the requirements of the Constitution. But, while the question of construction does not, as we think, have any important bearing upon the character of the tax or duty, still, if the tax or duty is held to be constitutional, that question is important in determining whether the act has been correctly enforced by the revenue officials, because if the charge is imposed upon the separate legacies and shares, or upon the privilege of receiving them, excessive amounts have been collected by the Government in almost every case. No legacy or share, or privilege, not exceeding ten thousand dollars in value, has been exempted, nor have the progressive rates of taxation been varied in any case according to the values of the legacies or shares, or privileges, but they have been regulated in every instance by the

value of the whole personal estate held in charge or trust by the administrator, executor or trustee. In the Knowlton case, owing to the fact that a single legatee received a share exceeding one million dollars in value, the excess collected was only \$1,991.75, but in many large estates, where the legacies and shares were numerous, and each one comparatively small, the excess constituted much more than one-half the tax collected.

While it is not a matter affecting the merits of any proposition involved in these cases, the facts that the Government will not be subject to any present embarrassment if required to refund what has already been collected, and that the prompt and efficient administration of public affairs is not at all likely to be dependent upon the continued collection of this tax, may properly be regarded as presenting a most favorable opportunity for the application of the true principles of the Constitution to this great subject of taxation, which is constantly growing more difficult and important on account of the multiplication of our industrial pursuits, the extent and character of investments in different kinds of property and the unequal distribution of

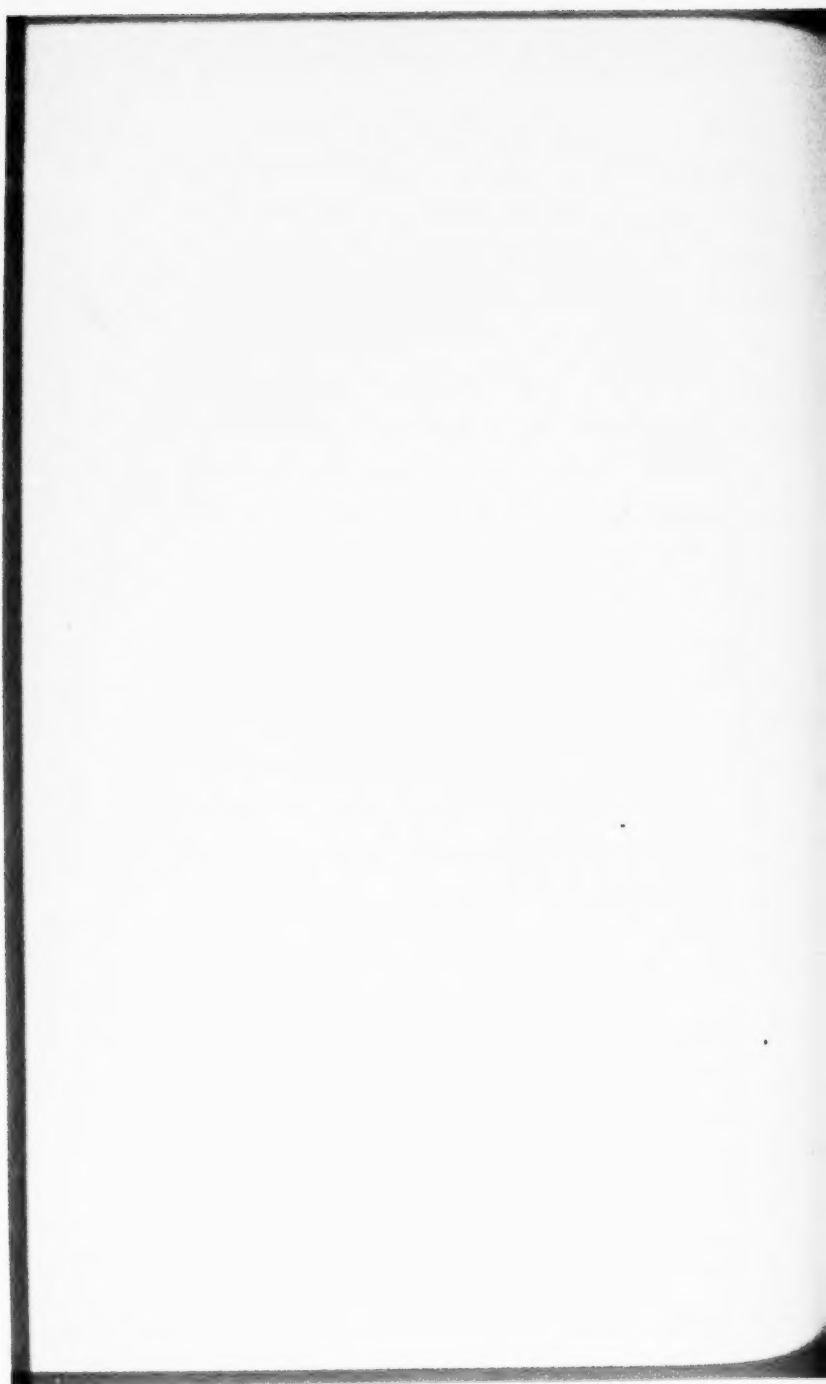
wealth among the people. In the presence of real or supposed emergencies, measures have sometimes been resorted to which could not have survived the test of judicial scrutiny, and the only certain way to prevent them, and thus save the Government from embarrassment at critical periods in the future, is to prescribe in advance the limits within which Congress may appropriate the property of the people by the imposition of taxes, duties, imposts and excises. The cases now before the Court seem to require distinct definitions of the two classes of taxation authorized by the Constitution, and an authoritative exposition of the rules to be observed by Congress in the exercise of its power to impose them; and we feel confident that, when this is done, the Court will be constrained to reverse the judgments in both cases.

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Brief of Reed & Thacher for Appellants
Brief of Reed & Thacher for Appellants
Supreme Court of the United States.
OCTOBER TERM, 1899.

Filed Dec. 22, 1899.

SHIRLEY T. HIGH ET AL.,

Appellants,

vs.

F. E. COYNE, Collector, &c., ET AL.,

Appellees.

No. 387.

EBEN J. KNOWLTON ET AL.,

Plaintiffs in Error,

vs.

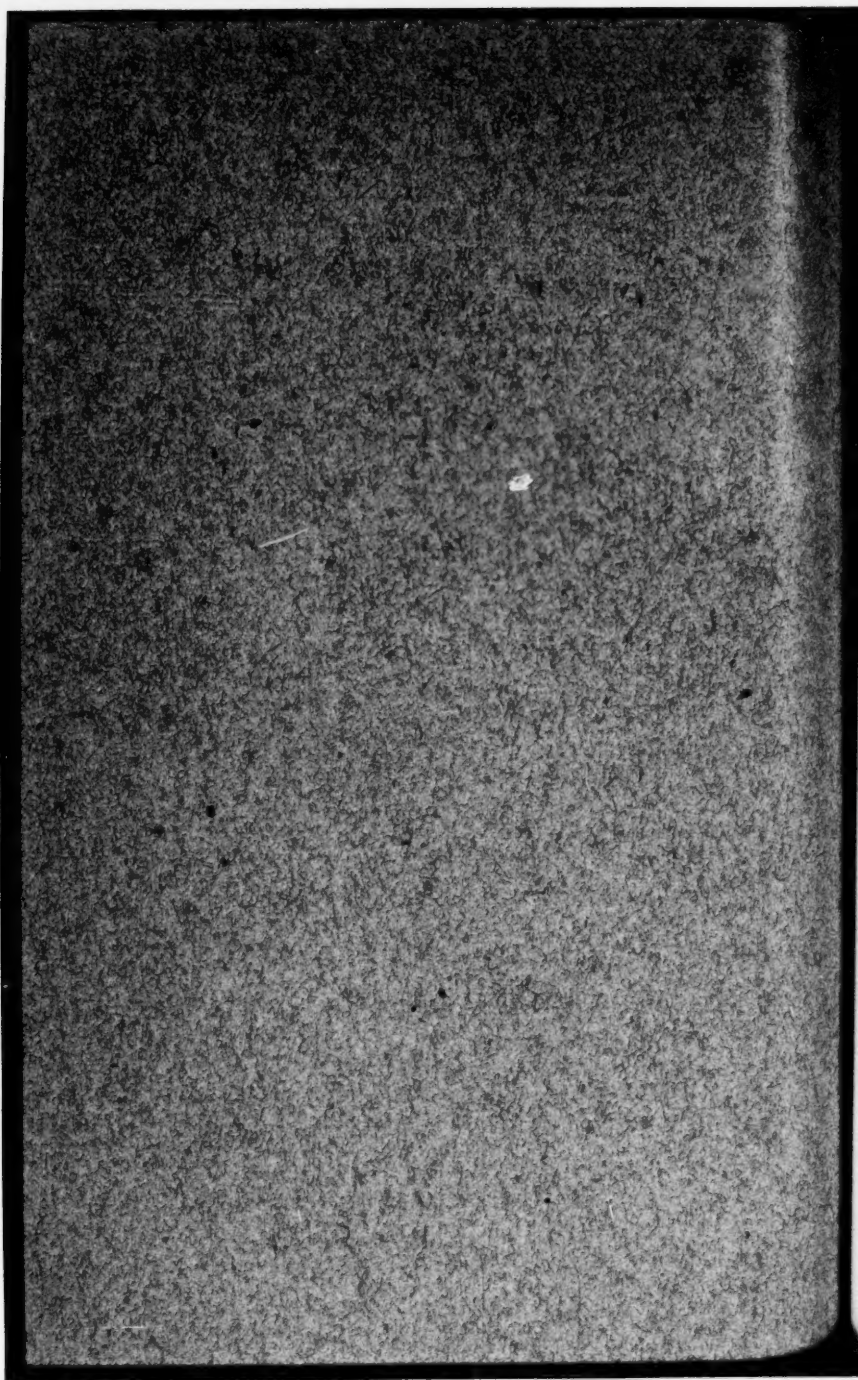
FRANK R. MOORE, Collector, &c., ET AL.,

Defendants in Error.

**BRIEF FOR APPELLANTS AND PLAINTIFFS
IN ERROR.**

**THOMAS B. REED,
THOMAS THACHER,**

Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH ET AL.,
Appellants,

VS.

No. 225.

F. E. COYNE, Collector, etc., *et al.*,
Appellees.

EBEN J. KNOWLTON ET AL.,
Plaintiffs in Error,

VS.

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FRANK R. MOORE, Collector, etc.,
et al.,
Defendants in Error.

Brief for Appellants and Plaintiffs in Error.

There could be no better time for the Court to pass upon the question at issue in the fullest and most satisfactory way. When the income tax question was before the Court, a decision such as was made involved a loss of revenue so great that other taxes had to be levied or a loan raised to meet the deficit caused by

the decision. The situation was such that the Court would have been more than human not to have been affected by it. Indeed, a Court out of touch with the thoughts of humanity would be unfit to marshal the affairs of human beings. Nevertheless, the Court did its whole duty in a way which renewed and heightened the esteem which it has always commanded except in times of extreme political excitement.

In the light of that decision other questions have arisen which have far-reaching consequences, but no surroundings which could affect our judgments. We have abundant revenue, so abundant that it unfavorably reacts on our general monetary condition. Our country would be better off not merely for the moment, but for all time, for a solid constitutional basis and limitation of taxation.

The Congress has power to lay and collect taxes, duties, imposts and excises by the very words of the Constitution.

But this power is limited in the case of capitation or direct taxes. If the tax in question is a direct tax, there is no dispute that it is unlawful because not properly laid.

One incident of unlimited taxation is that it is the power to destroy. While no one would contend that taxation is necessarily ~~any~~ destruction, yet the power ~~or~~ ^{probably} to destroy is one of the *indicia* of lawful unlimited taxation, and in this case is a final test. If lawful, it involves possibility of destruction. If the Constitution did not in any given case intend to give the power of destruction, then it did not give the power of unlimited taxation.

The doctrine in *McCulloch vs. Maryland* was very simple. If taxation was allowed, destruction might

follow. Destruction was never intended. Therefore, taxation was never intended. Taxation by the State could destroy the National Bank. The Constitution could not have intended that one of its instrumentalities should be at the mercy of any State. Therefore, taxation by the State could not be permitted.

The decision in *McCulloch vs. Maryland* was that the States could not tax the instrumentalities of the United States. The converse of that proposition holds true. The United States derives its powers from the Constitution. On taxation its powers are express. They can destroy nothing left to the States except where authorized by the Constitution. Therefore, they cannot tax in unlimited fashion, except where authorized by the very words of the Constitution. If they wish to exercise the power to tax, which, in its ultimate expression, is the power to destroy, there must be express authority. The only express authority given has this limitation—that the tax, if on property, must be laid on the census basis. Moreover, the doctrine, which was declared in *McCulloch vs. Maryland* as to the lack of power in the State to tax where destruction of United States rights were involved, was affirmed *e converso* where the United States tried to tax State functions.

All these cases are but expressions of the same idea, that no power is given under our system to either State or nation which involves the destruction of the functions of one by the other, unless by express limitation or necessary implication. On no other principle could our dual government exist. No greater service can be done the country, even by so great a tribunal as this, than the reaffirmation of this sound doctrine.

The States cannot tax United States instrumentalities (*McCulloch vs. Maryland*).

The United States cannot tax State instrumentalities. For example, they cannot tax revenues of municipalities, creditors of the State (*U. S. vs. R. R. Co.*, 17 Wall., 322-332), nor the officers of the State (*Collector vs. Day*, 11 Wall., 113) nor its bonds (*Merc. Natl. Bank vs. N. Y.*, 121 U. S., 138, 162).

All these decisions proceed not upon express words, for there are none, but upon the nature of things. If dual government is to exist, it can only exist in separate spheres. Two trains cannot travel in opposite directions on the same track at the same place. There may be switches, but these switches are those provided by the Constitution of solid metal, to be observed by all engineers on peril of smashup.

But is the tax in question a possibly destructive tax? Bring it to the test of the cases cited. What is the ultimate expression of this tax? If you can put five per cent. tax on the transfer, you can put one hundred per cent. That is destruction. Now, has the United States, under the Constitution, the right of destruction of real estate and personal property, which depend entirely, and were intended to depend entirely, on the State? Did the States surrender the right to control their real estate and personal property? According to the census, yes; otherwise, no.

It would seem, then, conclusive that the taxation was possibly destructive of rights reserved to the States.

If it cannot be justified as taxes, cannot it be under Article I, Section 8, 1st clause? Nobody will contend that it was a "duty" or an "impost." If anything, it must be an excise.

As to that the argument is :

1st. That the tax is not an excise. It is no more an excise than was the income tax. In fact, this Court, in *Scholey vs. Rew* (23 Wall., 337), held that there was no distinction in principle between an income tax and a succession tax.

To quote the exact words :

"The tax on income, which cannot be distinguished in principal from a succession tax, such as the one involved in the present controversy." Hence, it would follow that, the Court having justly decided the income tax to be a direct tax, should decide a succession tax to be direct also and not an excise, unless the Court has discovered some new distinction.

When the Constitution was adopted the word "excise" had a definite meaning. It was not a loose expression, but a very definite one. It meant a taxation of consumption or of special facilities to do business.

Mr. Justice SWAYNE says (*Pacific Ins. Co. vs. Soule*, 7 Wall, 433) :

"Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity and sometimes on the retail sale, sometimes on the manufacturer and sometimes on the vendor."

No excise we have ever yet attempted has ever got beyond this definition, which, if we analyze it carefully, seems to mean a tax on consumption, for manufacturing is for that purpose, and so is retail selling. Excise is really on consumption. Nor does the case of *Nicol vs. Ames* (173 U. S., 509) go any further. On the contrary, it is a most distinct recognition of the idea that, while Congress may tax facilities, opportunities and privileges of doing business, it may not tax business

itself as such. Property has for one of its values transferability. That value cannot be taken away except by the States. Any special facility or opportunity or privilege of transfer, however, may be taxed. Such is the decision of *Nichol vs. Ames*. To make this distinction more clear, Mr. Justice PECKHAM says, and his language reaches this very case :

“ A tax upon the privilege of selling property *at the exchange*, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. *The latter tax is really and practically on property.* ”

This covers the case at bar. The transfer here uses no uncommon facility, opportunity or privilege, only the facility, opportunity and privilege of death. Perhaps Congress might tax those whose property is transferred by death in the army, on account of increased opportunities, but is not likely so to do for other reasons.

2d. If the argument already made be not conclusive, as it seems to us it is, then the Court must inquire whether this tax is uniform throughout the United States. Whatever may be the effect of the last three words, or even what may have been intended by the framers of the instrument we are interpreting, it is to be hoped that no Court or Congress will attempt to repeal the fundamental law of a free people, that taxation must be uniform. Taxation is not only “ a practical thing,” as Mr. Justice PECKHAM well says in *Nicol vs. Ames*, but it is practical in its results. Liberty will not long survive equality, whether the inequality be supposed to favor the poor or the rich. Both poor and rich are alternately in danger, and the

scales of justice must be so held that neither will kick the beam.

That the tax in question is not uniform and not equal seems to have the most diverse foundations, and to have accumulated more good reasons for its destruction than any of its predecessors elsewhere. Not only are the taxes ununiform and unequal in the percentages mounting upwards, but they seem to be determined, not on the basis of what each one gets, but also on the basis of the total amount distributed, and the cost falls on the estate of the deceased, and depends, not on what he wants to give each one, but on what he wants to give all.

If we do no more than restate this question, and do not further argue it, it is not because of lack of faith, but because other briefs have worked the problem out so fully that nothing new remains to be said.

We conclude :

1st. That if this is not a direct tax, then the State can at any moment have the rights of property of its citizens put in jeopardy by a right on the part of Congress to tax transfers of property as such.

2d. That if there is no distinction in principle between an income tax and a succession tax, and the Court has decided an income tax invalid, either some distinction must be found or both taxes meet the same fate.

3d. As an excise tax, the tax in question is not equal or uniform ; or

4th. If it be uniform, it is not an excise tax, because it is neither on consumption nor on privileges or opportunities or facilities, but "really and practically on property."

We might add, and the Court might well take into

consideration, some general observations on the duty of making the foundations of taxation close and exact. While taxes are as a rule well spent in modern days, yet the spending is by those who have not earned them, and every nation should seek to leave the spending of money for the most part to those who have earned it. One of the worst opportunities afforded careless legislators is confusion of thought as to the limits of taxation. The sphere of the United States should be fully defined and double taxation avoided. If the people of the United States ever do seriously discuss the question of taxation, they will be amazed at the proportion it bears to the taxable accumulated property held by the people. By having a dual system of taxation, the people of the United States under any decision of the Court have the disadvantage of being the subjects of two sets of taxes, but this disadvantage may be reduced by careful and logical adherence to the principles already laid down by this Court.

While Congress should pay attention to the constitutionality of measures and should not ignore the fact that its action should, equally with the action of this Court, protect that instrument, nevertheless, as a practical fact the Congress does not, but passes the duty to this Court, which alone has become in doubtful cases the safeguard.

THOMAS B. REED,
THOMAS THACHER,
Of Counsel.

No. 225 ^{and} 387.

DEC 5 1899
JAMES H. MCKENNEY,
Clerk.

Brief of Ward for Appnts.
Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Dec. 5, 1899.

No. 225.

SHIRLEY T. HIGH ET AL., APPELLANTS,

vs.

F. E. COYNE, COLLECTOR, ETC., ET AL., APPELLEES.

No. 387.

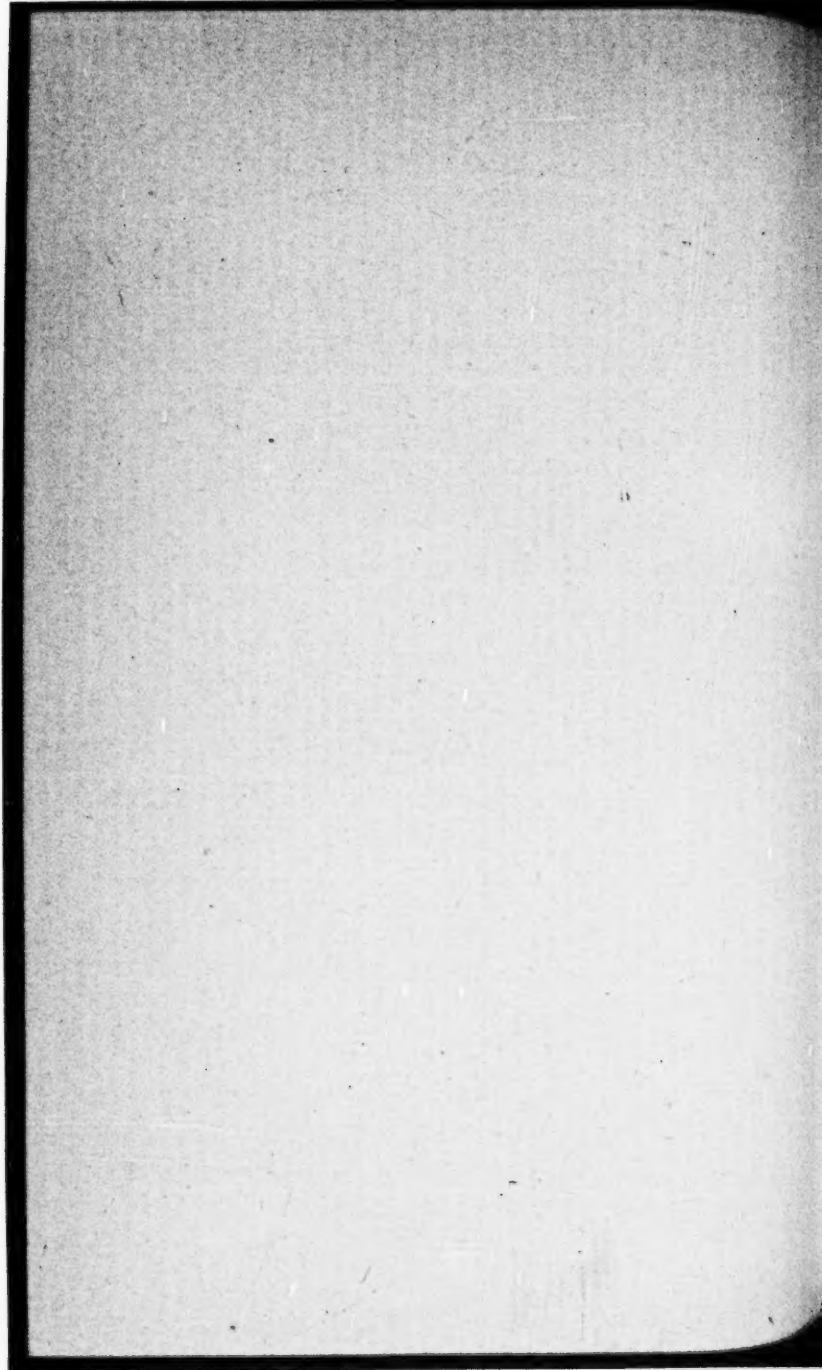
EBEN J. KNOWLTON ET AL., PLAINTIFFS IN ERROR,

vs.

FRANK R. MOORE, COLLECTOR, ETC., DEFENDANT IN
ERROR.

BRIEF FOR APPELLANTS.

HENRY M. WARD,
For Appellants.



IN THE
Supreme Court of the United States.

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ERROR.

BRIEF FOR APPELLANTS AND PLAINTIFFS IN ERROR.

Counsel for appellants and plaintiffs in error submits this brief upon two points only, all the other points having been fully covered in the briefs of other counsel.

I.

The graduated or progressive rate of taxation in this act is based upon the value of the whole estate of the decedent,

and not upon the value of the legacy transferred or of the privilege or interest enjoyed by the legatee, and hence is, in practical effect, whether the tax is direct or indirect, a regulation of the succession to personal property.

The Solicitor General maintains, as do we, under his sixth point, at pages 11 and 22, that the tax is graded according to the value of the whole estate, and does not raise, as we had expected that he would, the point that the true construction of the act is that where the value of the entire estate is greater than \$25,000 the rate of tax increases progressively and at a rate graduated with the value of the legacy, as such value passes from \$25,000 to \$100,000, to \$500,000 and to \$1,000,000. This construction is briefly referred to at page 31 of Mr. Otis' brief, but we differ from him in his conclusion as to the effect of such a construction upon the rate of the tax.

We submit that the words in the beginning of the first paragraph of section 29 of the act—

“Where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value passing after the passage of this act”—

and the words at the end of the same paragraph—

“Where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed in value the sum of \$25,000 the tax shall be,” etc.—

must refer to the entire personal estate, the sum of all the legacies or distributive shares in the hands of the executor or administrator; they do not admit of any judicial construction so as to be held to refer to the value of the separate legacies or shares.

If, then, the words "said property," in the last paragraph of section 29, where they occur in the phrases—

"Where the amount or value of said property shall exceed the sum of \$25,000 but shall not exceed the sum or value of \$100,000 the rates of duty or tax above set forth shall be multiplied by one and one-half," etc., etc.—

refer to the separate legacies or shares, they cannot also refer to the whole estate, so under this construction we would have the following classes based upon values :

- (1.) Estates of less than \$10,000, all legacies exempt.
- (2.) Estates of between \$10,000 and \$25,000, all legacies, no matter how small, taxed.
- (3.) Legacies of between \$25,000 and \$100,000 taxed at $1\frac{1}{2}$ times as high a rate as legacies in class 2.
- (4.) Legacies of between \$100,000 and \$500,000 taxed at twice as high a rate as legacies in class 2.
- (5.) Legacies of between \$500,000 and \$1,000,000 taxed at $2\frac{1}{2}$ times as high a rate as legacies in class 2.
- (6.) Legacies of over \$1,000,000 taxed at three times as high a rate as legacies in class 2.

But, under this classification, all legacies of less than \$25,000, where the estate is greater than \$25,000, would escape taxation, for, under this construction, there would be no part of section 29 which would impose any tax upon them, so that the only class of estates wherein such legacies

would be taxed would be estates of between \$10,000 and \$25,000 in value.

Such a construction would be absurd ; it would be based upon caprice ; would exempt an enormous amount of property, would lack uniformity, and, finally, would be in direct contravention of the first part of section 29, which says that the tax shall be imposed upon—

“any person having in charge or trust . . . any legacies . . . where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value.”

We may take it, then, as at once conceded and established that the tax is graded according to the wealth of decedents, and we might multiply instances of how in effect it alters the succession laws of the State, so that the next of kin of a millionaire do not succeed to the same part of his estate as do the next of kin of men of less wealth, while the widow and husband are preferred to the orphan and may succeed to the entire estate without bearing any share of a burden which, if constitutionally laid, would be imposed upon all in the same proportion.

The Solicitor General cites and relies upon the decision of this court in *Magoun ex. Illinois Trust and Savings Bank*, 170 U. S., 283, as an authority upon the power of Congress to make a classification based upon values and to tax members of the various classes at differing rates. The only similarity in the Illinois classification to that in the present act was in the case of legacies to strangers, where it was held in the prevailing opinion that six classes were created in which the tax varied progressively with the value of the

legacy. Mr. Justice Brewer in his dissenting opinion held the true construction to be that the tax varied with the value of the whole estate, as in the present act, and that such classification was wholly arbitrary and invalidated the entire act, and we feel fully justified in saying that if the court had adopted his construction they would have concurred in his opinion.

It is conceded by the Solicitor General that if this tax does amount to a regulation of the subject of successions, it is invalid as being beyond the power of Congress. (See Brief of Solicitor General, pages 16 and 22.) He also concedes that if a direct tax it is invalid, but he takes the position that it is—

“a duty or excise upon the right or privilege of the owner of the property to transmit it on his death, by will or descent to certain persons” (Fifth point, page 22).

Let us concede, for the argument only, that this construction is correct, and that this tax is upon the right or privilege of the decedent to dispose of his property by will or under the intestate laws, rather than, what we would consider a more natural conclusion, upon the right or privilege of the legatees or next of kin to succeed to or take possession of the property, and that this right or privilege can be taxed by Congress. It still would not follow, it is a totally different proposition to say, that Congress can make exemptions of certain rights and arbitrarily classify the right and privilege according to the wealth of the decedent and the relationship of the beneficiary. Take, as an example, the case of three persons who die intestate, A leaving a personal estate of

\$10,000 and one next of kin, a nephew, who receives it all; B leaving a personal estate of \$100,001. and ten next of kin, nephews and nieces, who each receive \$10,000.10, and C leaving a personal estate of \$1,000,000, no next of kin, and a widow who receives the whole estate. The succession to the property of A and of C is wholly exempt; upon the succession to the property of B a tax of \$3,000 is paid and necessarily \$300 deducted from the share of each next of kin, yet each of the next of kin of B has come into possession of property worth only ten cents more than that of the next of kin of A; for this additional ten cents each of them pays a tax of \$300; or if the portions had each been just \$10,000, each pays \$225, while the widow of C, who receives ten times more than all the next of kin of B and one hundred times more than the next of kin of A, pays no tax whatever upon her privilege. The right or privilege of the intestate, if he has any, or of his next of kin or widow, is in each case purely a creation of State statute. Such right is in each case in exact proportion either to the amount of property left by the intestate or received by the next of kin or widow. The sole next of kin of A enjoys the same right or privilege and succeeds to the same property as each of the next of kin of B, yet the one is taxed, the other exempt, while A and C, the intestates, whose privileges, so called, are the one of one-tenth the value, the other of ten times the value of the privilege of B, are both arbitrarily exempted from the tax. Clearly in this case, and it does not suppose any unusual or extraordinary condition of fact, the intestate succession is materially regulated and affected in a manner totally different to that which would ensue if the tax were at the same rate of per-

centage upon every succession without exempting the shares of any class.

Instances might be multiplied of intestate successions which this act regulates under the guise of taxation. If the intestate has any taxable privilege, it is in exact proportion to the value of his whole estate. The descent of personal property to a nephew is no greater privilege to the intestate than its descent to his son, or, if it is, then surely the descent to the brother is of the same grade as the descent to the nephew, who stands in the place, in most statutes of distribution, of the deceased brother, and should be put in the same class and taxed at the same rate, while there is no State, as far as we know, which has treated the rights of ascendants, descendants, brothers, and sisters as being in the same class for any purpose.

Take, again, the case of charitable bequests. The States have almost universally exempted them from the operation of their own legacy taxes. This exemption is a matter of internal policy with the States and a means of encouraging and developing their charitable, educational, and religious institutions. Such institutions are the only kinds of corporations which are to any considerable degree the recipients of the bounty of testators. Among the members of the Roman Catholic Church bequests are almost universally made to the bishop of the diocese, and property belonging to that church is held in the bishop's name. In recognition of this fact the transfer tax of New York provides that property bequeathed to a person who is a bishop or to a religious corporation shall not be subject to the terms of the act. Few bequests of any value are made to either charitable corporations or the

church except by persons owning estates of over half a million dollars in value; yet under this law all charitable bequests from the large estates are taxed from $12\frac{1}{2}$ to 15 per cent. Harvard University has since the law went into effect paid or become liable to pay over \$100,000 for the privilege of receiving legacies, and the Roman Catholic Church at least as much more. We cite these as instances because they have come under our personal observation. Doubtless other institutions and other churches are liable under the act to pay at least as much more. The Solicitor General at once sees the difficulty and points out the means of escape. He says at page 30 of his brief:

"It is ultimately charged up against the estate, and so the burden either falls upon the legatee or distributee, or is foreseen and provided against by the testator or intestate. It is impossible to say that under the operation of the act the tax is paid by the legatee, for naturally the testator, in making his will, will take into consideration the tax, so the legatee will get all the testator intended to leave him after the tax is paid."

In other words, if a millionaire wants a charity to receive \$100,000, he must leave it \$117,647, and the tax of \$17,647 will then be borne eventually by the residuary legatee or the other legatees, whose legacies will thus have to be cut down to pay the tax upon a legacy given to another. This suggestion of the Solicitor General amounts to an admission that this act is intended to tax the rich at a higher rate than the poor, rather than to provide for the general welfare of the country. Such questions, it is true, are not conclusive upon the question of the power to pass an act of this kind: but we submit that the court is entitled to consider that the

burden of this taxation falls most heavily upon those institutions of learning and charitable and religious bodies which have been almost universally exempted by the States which created them from every form of taxation.

Another point to be made against this law as in effect regulating the succession is that while all estates of less than \$10,000 are exempted, all legacies or shares of less than \$10,000 are taxed whenever the whole estate is greater than \$10,000. If any exemption is to be made of \$10,000, and we do not dispute that the Government in the exercise of its taxing power can make small and reasonable exemptions, yet that exemption once made should apply to all alike—if any sum of \$10,000 is to be exempted, every sum should be, as in the case of the income tax of 1894, where \$4,000 was absolutely exempted out of every income, however large. In this law the sum of \$10,000 is so large that its exemption in some cases and taxation at various rates in others clearly effects a regulation of the subject of successions.

II.

Those State decisions which have treated the State succession taxes as taxes pure and simple and not as regulations of the subjects of wills and succession have held that laws similar to this act in their exemptions and progressive rates violate the requirement of uniformity of taxation contained in the State constitutions.

The power of the States over the subject of wills and intestate successions is so complete and exclusive that they can forbid devises to the United States (*U. S. vs. Fox*, 94

U. S., 315), can tax bequests to the United States (*U. S. vs. Perkins*, 163 U. S., 625), and can limit the amount which a corporation can receive by will where testator leaves a wife and children (Laws of N. Y. 1860, ch. 360, § 1; *Fairchild vs. Edson*, 154 N. Y., 214). The State transfer tax laws are generally held to be not mere tax laws, but regulations of the subjects of wills and descents. Considered as tax laws alone, they could not be sustained, because of their exemptions and variations in rate. This is the settled doctrine of most of the States, and it has been adopted by this court in the *Perkins* and *Magoun* cases. Yet in certain States the inheritance taxes, considered as taxes alone, have been declared invalid for a lack of uniformity under provisions of the State constitutions similar to the provisions of the Constitution of the United States.

The constitution of Wisconsin provides :

"All such laws (general tax laws) shall be uniform in their operation throughout the State."

In 1889 the legislature passed an act (ch. 176, L. 1889) providing that in counties of over 150,000 inhabitants all estates over \$3,000 in value should pay a certain percentage to the county treasurer. In the case of *State vs. Mann*, 76 Wis., 780, the court says :

"Manifestly the act for the imposition and collection of the tax in question is not uniform in its operation throughout the State, but in direct violation of the provisions of the constitution is not only limited in its operation to Milwaukee county, but is further limited to a certain class of estates in that county. For these obvious reasons we must hold that the act in question is unconstitutional and void."

The constitution of Minnesota provides, § 1, article 9 :

"All taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation and be equalized and uniform throughout the State."

In *State vs. Gorman*, 40 Minn., 232, at 235, the court says with reference to chapter 103, Laws of 1885, which required estates to pay various sums ranging from \$10 on estates of less than \$5,000, \$1,000 on estates of from \$200,000 to \$500,000, and \$5,000 on all estates of over \$500,000 :

"While a large discretion must be allowed to the legislature in devising schemes for taxation, so as to secure equality as near as may be, it can hardly be doubted that in this case the constitutional requirement was not observed."

The Ohio constitution provides that—

"All laws of a general nature shall have a uniform operation throughout the State."

This constitutional provision was held to mean—

"that laws of a general nature shall be in *full and equal* force in all parts of the State."

State vs. Nelson, 52 Ohio St., 88, and cases cited.

And the Ohio succession tax, which is graded on a plan very similar to that at bar, was held invalid because of lacking such uniformity.

State vs. Ferris, 53 Ohio Stat., 336.

To the same effect, and on the broad principle that equality of burden must underlie every system of taxation, is the decision upon the New Hampshire legacy tax in

Curry vs. Spencer, 61 N. H., 624.

The long line of New York, Massachusetts, and Illinois decisions upholding the validity of classifications and variations in rate all turn upon the point that the acts in question are not tax laws, but regulations of the succession to decedents' estates, and it may be added as further distinguishing the many New York decisions that in the New York constitution there is no requirement that taxes shall be uniform.

HENRY M. WARD,

Counsel for Appellants and Plaintiffs in Error.

DECEMBER, 1899.

No. 225.

Adel. & Dy. of Pence & *James H. McFerry* Clerk

Office Supreme Court U. S.
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Filed Mar. 7, 1900
IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 225.

SHIRLEY T. HIGH et al.,
Appellants,

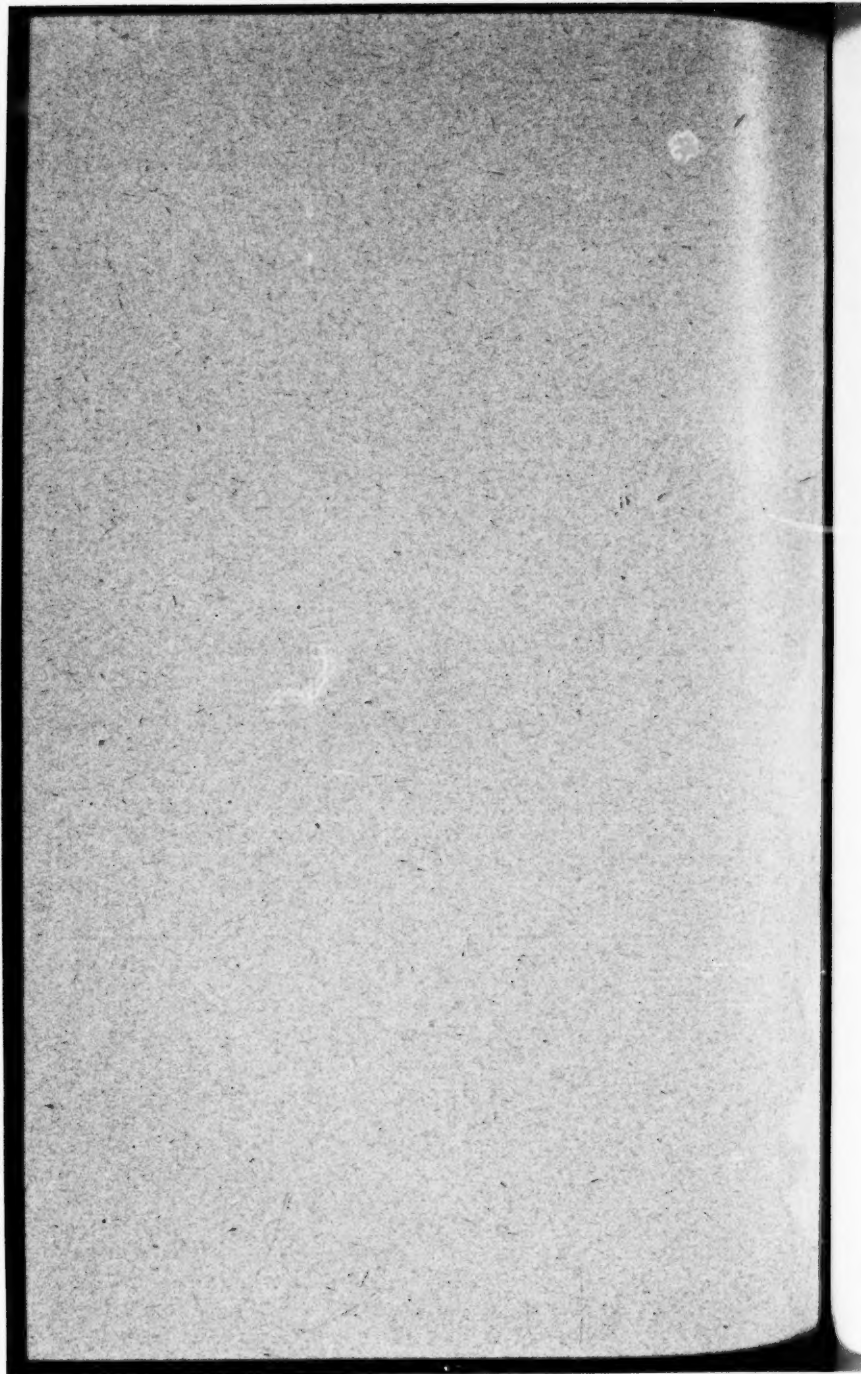
vs.

FREDERICK E. COYNE, Collector, etc., et al.,
Appellees.

ARGUMENT FOR APPELLANTS BY ORDER OF COURT.

ABRAM M. PENCE.
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COUNSEL FOR APPELLANTS.



IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 225.

SHIRLEY T. HIGH et al.,
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vs.

FREDERICK E. COYNE, Collector, etc., et al.,
Appellees.

ARGUMENT FOR APPELLANTS BY ORDER OF COURT.

On February 26, 1900, this court entered the following order in said cause :

“Ten days given counsel to submit briefs on the construction of the act under consideration in respect of the question whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or by the amount of the legacy.”

In obedience to such order we submit the following:
Section 29 of the act reads as follows:

“That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property where the the whole amount of such personal property as aforesaid shall exceed the sum of

ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, *as follows, that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:*

“ First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

“ Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

“ Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

“ Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the person who died possessed as aforesaid, at the rate of four dollars for

each and every hundred dollars of the clear value of such interest.

“Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

“Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.”

(For convenience of reference we have italicized parts of this section.)

All parts of a statute must be construed together so that there may be a harmonious whole. When a statute is plain and intelligible, there is no room for construction.

An ambiguity will never be created by construction where the language is unambiguous when applied to its proper subject-matter.

If there be a subject-matter in the statute to which the language under construction may be applied, then it will not be applied to another subject-matter in the same statute which will make it ambiguous.

The tax or duty is imposed upon each of the legacies. Section 29 imposes the same upon the administrator, executor or trustee *with respect to such legacies*, and section 30 recites over and over again that such tax or duty is imposed *upon* the legacies, and section 30 clearly makes such tax or duty a lien upon the whole estate.

In our judgment, the statute under consideration admits of no other construction than that the measure of such tax or duty is the *volume of the estate* out of which the legacies and distributive shares arise, and not the *amount of the legacy* itself, for the following reasons:

Because the first part of the first sentence provides,

“ That any person or persons having in charge or trust, as administrators, executors or trustees, *any legacies or distributive shares arising from personal property*, where the *whole amount of such personal property* as aforesaid shall exceed the sum of ten thousand dollars in actual value, *passing, after the passage of this act, from any person possessed of such property*, either by will or by the intestate laws of any state or territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States,”

which indicates that such administrators, executors or trustees shall be made liable with respect to such legacies or distributive shares.

Section 30 also provides that such legacies or distributive shares are made liable to such duty or tax. Such administrators, executors or trustees are not made individually liable, but only with respect to such legacies or distributive shares out of which they may idemnify

themselves. The same clause or part of sentence above quoted provides that they are only made liable where such legacies or distributive shares arise *from personal property* by will or by the intestate laws of any state or territory where *the whole amount of such personal property so passing* and out of which such legacies or distributive shares arise exceed \$10,000 in actual value.

Thus it appears from this provision that the amount of the legacy or distributive share does not determine the liability thereof, or the liability of the administrators, executors or trustees with respect thereto, to a tax or duty; but the fact that it arises out of an estate exceeding \$10,000 in actual value determines such liability.

It matters not what the amount of such a legacy or distributive share may be, whether it be \$500 or \$100,000. All that is required is that the estate shall exceed \$10,000.

It must here be borne in mind that a liability is placed upon such legacy, whatever it may be, when the estate out of which it arises exceeds \$10,000; and we will hereafter refer to this fact as showing that any construction of the subsequent clauses of the section, which would relieve *any legacy* of whatever size from such liability, arising out of such an estate, would be in antagonism and out of harmony with the whole scheme of the statute.

The relation of decedent and legatee or distributee does not establish the liability of such legatee or distributee, or of his obligation or that of the administrator, executor or trustee, to pay the tax.

Such relationship is one of the elements only in ascertaining the *amount* of said tax, but not the liability therefor; the liability for any tax whatever is determined by the foregoing clause quoted from.

By this clause every legacy or distributive share, however small or however large, is to be taxed if the estate out of which it arises exceeds \$10,000.

In other words, the liability of such legacy and distributive share is "*measured by the volume of the estate*," whereas, "if measured by the amount of the legacy" it might happen, or would often happen, that many legacies out of estates exceeding \$25,000—as, for instance, out of estates of \$100,000, or even a million dollars, or more, would not be liable at all; that is, if the legacy were less than \$10,000.

Such is not the meaning of the clause quoted and such cannot be the meaning of any portion of the statute. In order further to show that such a construction cannot be entertained for a moment, we refer to the next clause in section 29, which we have italicized and which is as follows:

"That is to say, where the whole amount of *said personal property* shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be: First," etc.

What is meant by the words "the whole amount of said personal property shall exceed in value ten thousand dollars," etc.?

Is it not the same personal property referred to in the previous clause and almost in the exact language? The previous clause reads:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where *the whole amount of such personal property, as aforesaid*, shall exceed the sum of ten thousand dollars in actual value, passing," etc., "shall be made subject to a duty or tax," etc.

What shall be made subject to a tax? The legacies or distributive shares. When? When *the whole amount of said personal property* shall exceed \$10,000.

The whole amount of said personal property is either the *whole estate*, or the whole of *all the legacies and distributive shares* exceeding \$10,000 and not the amount of a single legacy. The "*whole amount*" would have no significance if applied to a single legacy.

Can anyone doubt from the foregoing alone that it is not the legacy or distributive share that must exceed \$10,000 in order to be liable to the tax, but that any legacy, however small, is liable to the tax if it arises out of an estate exceeding \$10,000; that is, the liability to the tax depends not upon the amount of the legacy, but upon the volume of the estate out of which it arises.

Now, if we will read the first *numbered* paragraph of section 29 we will see still more clearly, if it were possible that the *liability* and rates are fixed not by the amount of the legacy but by the volume of the estate out of which it arises, and also by the relation of the legatee and distributee to the decedent.

The first *numbered* paragraph of section 29 reads:

"First: Where the person or persons entitled to *any beneficial interest* in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value *of such interest in such property.*"

Who is the person entitled to *any beneficial interest in such property*? It is the legatee or distributee. What does "*in such property*" mean? If it had meant the legacy, the words, "where the person or persons entitled

to *any beneficial interest in such property* shall be lineal issue," etc., would not have been used, but something like the following would have been used: "Where the person entitled to such property shall be the lineal issue," etc.

It appears from this first numbered paragraph, therefore, that there is a distinction between the legacy and the volume of the entire estate; that is, a person having a *portion of such beneficial interest* carved out of the volume of the entire estate is to be taxed at a certain rate, namely, seventy-five cents on the hundred dollars, and it does not provide that the person having a legacy of \$10,000 shall be taxed at that rate, but a person having a legacy of any size carved out of an estate exceeding \$10,000 is to be taxed at the rate aforesaid irrespective of the amount of such legacy.

The words, "*in such property*," clearly mean in the property referred to in the previous clause in italics, namely, an estate exceeding \$10,000 and not exceeding \$25,000, and that the amount to be taxed at the rate prescribed is *any amount which any beneficiary* may have in the volume of the estate out of which the legacy arises. That previous clause introduces a certain class of estates; namely, those exceeding \$10,000 and not exceeding \$25,000, and proceeds to levy a tax against any person *entitled to any beneficial interest in such property*, be the small large or small. This *first numbered paragraph* for the first time introduces a rate and discriminates between the volume of the property out of which the legacy is to be drawn and the amount of the legacy itself.

The rate does not vary in these *five numbered paragraphs* according to the size of the legacy but according

to the relationship of the parties. The legatee does not purport to be taxed by this *first numbered* paragraph upon a legacy exceeding \$10,000 and not exceeding \$25,000 at the rate of 75 cents upon a hundred dollars, but is taxed upon *his beneficial interest*, whatever that may be, arising out of an estate of a certain amount. It is *his beneficial interest* in such estate that is taxed, but the rate is measured in part by the amount of the estate out of which it arises.

Again, by referring to the first two lines of paragraph numbered *first*, which reads: "Where the person or persons *entitled to any beneficial interest* in such property," etc., we see that the legacy which is to be taxed at such rate is not the *entire* property previously referred to in the italics, but it is *any beneficial interest* in the whole of some personal property, thereby indicating that *whatever the beneficial interest* may be in said personal property exceeding in value \$10,000, and not exceeding \$25,000, is to be taxed at the rate therein indicated. It may be \$100 or it may be \$1,000, which shows that it is not the amount of the legacy or *beneficial interest* which measures the tax, but *the estate* out of which it arises. And again, at the end of that sentence in the *first numbered paragraph*, we see that "the rate of 75 cents for each and every hundred dollars of the clear value," etc., is not upon the clear value of *the property* described in the previous italicized paragraph, but it is 75 cents on every hundred dollars of the clear value "*of such interest*" in "*such property*," meaning the property referred to in the italicized paragraph preceding it.

Thus there can be no doubt that the rate is measured not by the size or amount of the legacy, but by the size or amount of the estate out of which the legacy arises.

If there could be a shadow of a reason why we should treat the words "*personal property*" or the words "the whole amount of such personal property" in the first five lines of section 29 as relating to the legacy itself and not to the volume of the estate, there could remain no doubt, when we come to consider the first numbered paragraph, but that the words "the whole amount of said personal property" appearing in the first five lines of the section and also in the first italicized paragraph mean the entire amount of the personal estate.

Can any reason be perceived why Congress should have used the following words: "**Any** legacies or distributive shares *arising from personal property where the whole amount of such personal property, as aforesaid,* shall exceed the sum of \$10,000 in actual value, passing," etc.; in case the limit of \$10,000 applied to the individual legacies or distributive shares, instead of to the whole amount of the entire personal estate; or why the words should have been used at all, "the whole amount of such personal property," in case it was intended that only legacies were to be taxed which individually exceed \$10,000?

The draftsman of the bill clearly intended that there should be no doubt or ambiguity, and hence he used the words that while the legacies or distributive shares should be taxed, it should only be where they arose from personal property exceeding \$10,000. Why use the words "arising from personal property" if the legacy itself exceeding \$10,000 is to be taxed, instead of the estate out of which it was to arise?

Is it possible that any clearer language could have been used to express the idea that the *volume* of the estate and not the *amount* of the legacy was to fix the rate upon the legacy?

It is idle to claim that the rates contained in *numbered paragraphs first, second, third, fourth and fifth* are based upon the amount of the legacy. Such construction has no basis in a single word, clause or paragraph.

The rates fixed by numbered paragraphs second, third, fourth and fifth vary from paragraph first according to the relationship only.

We are now prepared to consider the last paragraph of section 29, which is in italics. It reads as follows:

“ Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.”

It seems clear to us that the object of the paragraph just quoted is to take up the various classes of estates measured by different amounts, *in their order*, and to provide for the taxation of the legacies arising therefrom in the same way that estates exceeding \$10,000 and not exceeding \$25,000 were taken up and disposed of in the first instance. This paragraph has the same meaning precisely as our first italicized paragraph, and the numbered paragraphs following the same, excepting that it relates in progression to estates of larger amounts, and has the same

meaning or significance as if Congress had repeated our first italicised paragraph, only changing the amount of the estate being dealt with, and then had added the numbered paragraphs first to fifth respectively, and had gone through, in order, the estates valued at the different amounts in detail, the same as was done in the first instance. That paragraph can have no other significance.

Have we heretofore established that all the legacies and distributive shares, *however small*, arising out of an estate exceeding \$10,000 and not exceeding \$25,000, are liable for such tax or duty at the rates prescribed in the numbered paragraphs first, second, third, fourth and fifth, and that such rates are not measured by the amount of the legacies but by the volume of the estate out of which they are drawn, in part at least? If we have, then we know at once and exactly the meaning of this last paragraph in italics.

It means that as the size of the estate out of which legacies and distributive shares arise, increases, so does the rate of the tax or duty upon all such legacies, however large or small, increase, and that legacies of the same size or amount to persons standing in the same relationship vary as to the rate of the tax according to the size of the estate from which they are drawn.

Does not the language read thus:

“Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax *above set forth* shall be multiplied by one and one-half,” etc.?

It is almost the identical language used in the first italicized paragraph.

What is the meaning of the words "the rates of duty or tax above set forth"?

"The rates of duty or tax above set forth" refer to the rates established by the numbered paragraphs, first to fifth, inclusive; and we have found heretofore that such rates upon the legacies referred to in those paragraphs are determined by the *volume of the estate* out of which they arise, as well as by the relationship, and not by the size of the legacy.

If such be the case, then the meaning of this last italicised paragraph is determined. It means that the rates are increased according to the increase of the size and volume of the estate out of which the legacies arise, however small the same may be, and are not increased according to the size of the legacy. Any other construction in our judgment would lead to an absurdity. It would be holding that Congress intended to lay down two rules in the same section without any apparent distinction or difference as to the subject-matter. If it be conceded that the rates established upon the legacies arising out of estates whose volume exceeds \$10,000 and does not exceed \$25,000, do not depend upon the size of the legacies but upon the volume of the estate, then it would seem almost ridiculous to imagine or to suppose that Congress intended to change their intent touching all legacies exceeding \$25,000.

By any such construction there would be a want of uniformity between the rates imposed upon legacies arising out of an estate exceeding \$10,000, but not exceeding \$25,000, and rates imposed upon legacies of the same amounts arising out of estates of more than \$25,000. Such construction would clearly render the whole law unconstitutional, as a different rate would be created by the

law itself touching legacies of the same size and amount. Legacies of any and every amount arising out of estates from \$10,000 to \$25,000 are taxed at a fixed rate according to relationship.

Legacies arising out of estates exceeding \$25,000 would not according to the construction that the amount of tax is measured by the amount of legacies and not by the volume of the estate out of which they arise, be taxed at all in case such legacy be \$25,000 or less.

Thus, a legacy to a child of \$24,000, where it arises out of an estate of \$25,000 or less, is taxed by the statute at the sum of \$180; or, if given to a stranger in blood or to charity, it would be taxed at the sum of \$1,200, while if the same sum of \$24,000 were given to a child or charity out of an estate of \$25,001 or out of estate of \$1,000,000 or \$50,000,000 it would not be taxed at all.

This result, of course, is absurd, and is based upon the theory that all legacies arising out of estates between \$10,000 and \$25,000 are taxed not according to the legacies but according to the amount of the estate out of which they are drawn, and that all legacies growing out of estates over \$25,000 are measured by the amount of the legacy.

This is the result of such construction if the last clause in italics, namely, "*Where the amount or value of such property shall exceed \$25,000 but shall not exceed,*" etc., "the rates of duty or tax above set forth shall be multiplied," etc., means the amount of the legacy and not the volume of the estate.

This would be an absurd result and could have never been the intention of Congress. Such a construction, as we have seen, would at once render the whole act unconstitutional.

It appears, by examining the proceedings of Congress, that the main idea was that estates composed of personal property should be reached by this method of taxation, because it was supposed that for many reasons personal property had theretofore largely escaped taxation.

To give another illustration: Suppose a man having an estate of \$100,000 bequeathed the same to his four children, giving each \$25,000. Such legacies could not be taxed at all, because they do not exceed \$25,000, but arise out of an estate exceeding \$25,000.

To give another illustration: If a man leaving an estate of \$75,000 should give his wife \$50,000 and each of his five children \$5,000, such legacies could not be taxed, as the legacy to the wife is exempt and the legacies to the children are less than \$10,000, though such legacies would be taxed in case the entire estate had only been \$25,000 instead of \$75,000. This result would be obtained in case the whole statute should be construed to mean that the rate is fixed by the amount of the legacy and not by the volume of the estate. It was clearly the intention of Congress to reach *large estates*, largely untaxed during the lifetime of decedents, and by such interpretation the whole estate, however large, would escape if testator divided it into legacies of \$10,000 or less.

These illustrations are sufficient to show that Congress could not have had any such intention

It is a well-recognized principle also that *contemporaneous exposition* by the executive branch of the government or other branches may be referred to by the courts for the purpose of ascertaining the meaning of a statute where ambiguous. It is a remarkable circum-

stance that in the case at bar, every lawyer in the case assumed, without much or any argument, the interpretation of this act to be that the tax or duty imposed was to be measured by the volume of the estate and not by the amount of the legacy.

This assumption was also made and acted upon by the solicitor general. (See pp. 11 and 22 of his first printed argument.) Upon application of the treasury department, the legal department of the government advised that such was the construction.

It would seem, therefore, that this must be the natural construction, and there did not seem to be any ambiguity to the counsel on either side.

We refer to this because it somewhat aids the court in ascertaining the common sense view taken by reasonably intelligent men, and assumed without argument. Had there been any doubt in the minds of any counsel, it must be presumed that something more would have been said touching such construction.

The construction contended for by us must be the natural construction, and it must require some supple exercise of the reasoning faculty to reach a different conclusion touching this statute.

The current of authority at the present day is in favor of reading a statute according to the natural and most obvious import of the language, without resorting to subtle and forced constructions for the purpose of either limiting or extending its operation. Courts will not pervert language in order to render a law either constitutional or unconstitutional, but will try to ascertain the meaning of the parties using the same.

It has some value also that the treasury department of

the government has construed this statute in the same way and all the officers of the government have enforced the tax accordingly, so far as it has been enforced.

There is another source of exposition, while not conclusive, yet it must have a potent influence over the minds of men touching the just construction of a statute; it is the construction given to the same by the different members of the legislature that passed it. The sections in question were not in the original bill when it came from the House, but they were introduced as an amendment by the Senate finance committee, and the same seems to have been in charge of Senator Wolcott of Colorado.

We find in the Congressional Record the remarks of various senators which we will hereafter set out, and it is remarkable that not a single word was said by any one in the Senate or House, so far as we can ascertain, giving a contrary or different construction to the sections in question.

In the course of the consideration of these two sections the following discussion took place in the Senate (May 20, 1898, Congressional Record, Vol. 31, part 6, 55th Congress, second session, p. 5074):

“Mr. Lodge: * * *

“There is another point that I desired to ask about. I may be wrong in my interpretation of the bill, but what appears to me to be the case is that if a man inherits \$100,000 from an estate of \$200,000, he pays one tax. If he inherits \$100,000, exactly the same amount, and from an estate of \$1,000,000, he pays a much heavier tax. The man who inherits \$100,000 from the estate of \$1,000,000 may be a poor man, and the man who inherits \$100,000 from the estate of \$200,000 may be a rich man, and yet the man inheriting the \$100,000 from the estate of \$1,000,000 pays two and a half times as

much; that is, the tax appears to be levied upon the original estate, without reference to the beneficiaries. I don't see why \$100,000 in a legacy should pay more coming from an estate of one size than coming from an estate of another size.

Mr. Wolcott: I should like to ask the senator from Massachusetts if he believes, in view of some of the enormous accumulations of fortunes in this country, out of which the personal property pays practically nothing in taxation during the life of the owner, it is inequitable that a personal estate of \$5,000,000 should pay a greater sum proportionately to the government than an estate of \$20,000? "

* * * * *

Mr. Lodge: That opens up the whole question of a graduated tax. I believe as a matter of sound taxation the object is to tax the dollar and not the man. I believe the dollar should be taxed, whether it is \$1 from \$20,000, or \$1 from \$5,000,000.

Now, I favor an inheritance tax as a principle of taxation. * * * I think also that it is a tax which ought to be left to the state and not taken by the United States. But I fail to see the justice of taxing a man who gets perhaps \$5,000 as a small bequest from an estate of a million dollars. Perhaps it is all that he has. When that is left him by a person possessing a million-dollar estate, why should he pay two and one-half times as much as a man who gets precisely the same amount from a smaller estate?

I agree it seems on the surface proper that a large estate should pay more than a small estate, and if the tax was graded in that way it might be open to less objection. But this is graded so as to tax the legacy on a different scale. The object is, of course, to reach the property, and seems to me that where the legacy is the same, a man should not be forced to pay more on the same amount because he happens to receive his legacy from a larger estate."

And again on page 5079 of the same volume:

“The Secretary: On page 67, line 6, strike out ‘five’ and insert ‘ten’ before ‘thousand’ so as to read:

‘Where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed in value the sum of \$25,000, the tax shall be:’

Mr. Chandler: I wish to inquire whether the limitation on the amount is a limitation as to the whole estate or as to the individual legacy.

Mr. Wolcott: It is only the personal estate, I will say to the Senator.

Mr. Chandler: The provision is:

‘Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be.’ Does that mean the whole estate or the individual legacy?

Mr. Wolcott: *It applies to the whole estate.*

Mr. Chandler: If the whole estate which is bequeathed by the testator should amount to \$10,000, is every legacy, however large or small, taxable?

Mr. Wolcott: Certainly. *The amount of the tax on it is determined by the totality of the personal property left. If it be \$10,000, then it is taxable, however small or large the legacy may be*

* * * * *

Mr. Chandler: I understand that; but I was not certain whether the words ‘such personal property’ meant the totality of the personal property in the hands of the testator or donor, or whether it meant where the personal property passing to each individual amounted to \$10,000. I understand now that it applies to a case where the whole estate exceeds \$10,000, and if the amendment be adopted there will be no tax upon anything less than that.

Mr. Wolcott: That is right.

Mr. Chandler: And where it does exceed that amount every legacy, large or small, is to pay the tax which is provided.”

We do not claim that this court is bound by the re-

marks of senators during the proceedings in Congress as to the construction of this act. It is the function of this court, however, to interpret the meaning of the statute and to ascertain the object intended by Congress to be reached. The only indication which can be found in the deliberations of Congress on the point under consideration we have already set forth *verbatim*. This inheritance tax originated in the senate. Its sole object was to tax large accumulations of personal property left by decedents. The senate in the discussion of these sections stated their object and adopted them with that end in view. Ought not this court to construe this act in the light of the legislative interpretation, and assume that the construction put upon it by the body enacting it to be the true construction?

SUMMARY.

1. That the interpretation of the words, "that any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares *arising* from personal property *where the whole amount* of such personal property, as aforesaid, shall exceed the sum of \$10,000 in actual value, passing," etc., "shall be and are hereby made subject to a duty or tax," is that the administrators, executors or trustees are to be taxed with respect to such legacies, only when the volume of the estate out of which they arise exceeds \$10,000. and not where the legacies or direct shares exceed \$10,000.

2. That the interpretation of the first italicized clause, namely, "*where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed*

in value the sum of \$25,000, the tax shall be," etc., is that the volume of the estate out of which such legacies arise must exceed \$10,000 and not exceed \$25,000 irrespective of the amount of such legacies.

3. That the interpretation of the words in the first numbered paragraph, namely, "Where the person or persons entitled to *any beneficial interest* in such property," etc., is that the legatee or distributee is the person indicated who is *entitled to any beneficial interest*, and the words "*person entitled to any beneficial interest*" indicate that a person having any beneficial interest, *however small, in such property*, where the whole estate exceeds \$10,000, and does not exceed \$25,000, referred to in the previous italicized clause, is subject to the rate indicated in said *first numbered paragraph*.

4. That the interpretation of the words at the end of the first numbered paragraph, namely, "at the rate of seventy-five cents for each and every hundred dollars of the clear value of *such interest in such property*," is, that such interest as any beneficiary or legatee or distributee possesses, *however small, in such property* is an *interest* which is to be carved out of an estate exceeding \$10,000 and not exceeding \$25,000, and that such interest so subjected to such rate need not be \$10,000, but may be much less. "Any interest" or "such interest" implies that it need not be the whole interest pointed out in the preceding italicized clause.

5. That the interpretation of the words in the second italicized clause, which is at the end of the fifth numbered paragraph, namely, "Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax

above set forth shall be multiplied by one and one-half," etc., is that the words, "amount or value of said property," relate to the volume of the whole estate precisely as do the words, "the whole amount of said personal property," used in the first italicized clause, just preceding the first numbered paragraph; and that the rate of the tax is to be levied upon the legacy, however small it may be, where it arises out of an estate exceeding \$25,000, etc., and that the rate is not measured by the amount of such beneficial interest or legacy, but by the volume of the estate, precisely as in the first instance.

6. To hold that by the latter portion of the section all legacies exceeding \$25,000, etc., are to be taxed at an increased rate and that the tax is not to be measured by the volume of the estate out of which the legacy arises, is to hold that Congress changed its intention with reference to such larger estates, which is not possible. Such interpretation would also render the entire statute clearly unconstitutional; in that legacies of the same amount going to persons standing in the same relation to the decedent would be taxed at a different rate.

The law cannot be constitutional if both intentions are embodied in it, namely, that as to estates exceeding \$10,000 and not exceeding \$25,000, the rates should be fixed by the volume *of the estate* and not by the amount of the legacy, and in estates exceeding \$25,000 that the rate should be fixed by the amount *of the legacy* and not by the volume of the estate out of which it arises.

7. If there be two intentions expressed in the statute we would have want of uniformity in four particulars:

(a) In the first place we would have a tax upon legacies of any amount which arise out of an estate exceeding \$10,000 and not exceeding \$25,000.

(b) We would have a tax upon legacies measured by their amount where they exceed \$25,000.

(c) We would have no tax upon legacies which are less than \$10,000 and which arise out of estates that are less than \$10,000.

(d) And we would have no tax upon legacies of \$25,000, and less, which arise out of estates of more than \$25,000, be the same a hundred thousand dollars, a million dollars, or fifty millions.

8. Contemporaneous exposition aids the court in arriving at a correct construction.

Our exposition was adopted by the legal department of the government.

It was adopted by the treasury department of the government.

It was adopted by all of the counsel in these cases, substantially without argument, including counsel for the government.

It was adopted in the discussion in Congress, and no other interpretation was suggested.

Considerable amounts of revenue have been collected upon this interpretation.

Respectfully submitted.

ABRAM M. PENCE,

GEORGE A. CARPENTER,

SHIRLEY T. HIGH,

Counsel for Appellants.



No. 225 and 387.

By. of Reed & Thacher on Question by
Court.

Office Supreme Court U. S.
FILED

MAR 10 1900

JAMES H. BECK
Clerk.

Supreme Court of the United States.

Filed Mar. 10, 1900.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH ET AL.,

Appellants,

vs.

No. 225.

F. E. COYNE, Collector, etc., ET AL.,

Appellees.

EBEN J. KNOWLTON ET AL.,

Plaintiffs in Error,

vs.

No. 387.

FRANK R. MOORE, Collector, etc., ET AL.,

Defendants in Error.

Brief in Response to Suggestions of the Court by
its Order of February 26, 1900.

THOMAS B. REED,

THOMAS THACHER,

Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1899.

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et al.,
Defendants in Error.

No. 387.

Brief in Response to Suggestions of the Court by its Order of February 26, 1900.

By said order the Court suggests that counsel submit briefs "on the construction of the Act under consideration, in respect of the question whether the tax or duty imposed on each of the legacies is measured by the volume of the estate, or by the amount of the legacy."

At the end of the first paragraph of Section 29, immediately preceding subdivision marked "First" are

these words : " *Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be :* " and after the five subdivisions are the words : " *Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars,* " &c.

We understand the question offered for discussion to be : What is the meaning of the words " the whole amount of said personal property," and of the later words " the amount or value of said property," in these clauses of the act ? As applied to an estate passing by will, do they mean the volume of the personal estate or a single legacy ? Clearly, as it seems to us, they mean the volume of the personal estate, the intention being that, where the *whole amount of the personal property in an estate* exceeds \$25,000, the stated rates shall be multiplied by one and a half, or, if it exceeds \$100,000, such rates shall be multiplied by two, and so on.

It is quite important to note that the act (Section 29 of the War Revenue Act) speaks of but a *single tax or duty* imposed upon a single person or group of persons. It is drawn as having in mind a single estate or trust and a single tax or duty with respect thereto. It attaches with respect to any estate within the description, of course, but the use of the singular number must not be overlooked in construing it. The subject of the sentence with which this sentence begins (or, perhaps, it should rather be said, which makes up the section) is : "*Any person or persons* having in charge or in trust, as administrators, executors or trustees, any *legacies* or distributive *shares* arising from personal property." It is not "*all persons* having in charge legacies or distributive shares." If it were, this plural might be thought to be used distributively, and the conclusion might be permitted that the same use of the plural was intended in "legacies or distributive shares." "*Any person or persons* having in

charge or in trust * * * any legacies or distributive shares" means either a sole executor, administrator or trustee, or two or more executors, administrators or trustees acting together with respect to a *single estate*. This seems clear enough while attention is confined to the subject. Is not all doubt removed by the predicate, which is "shall be, and hereby are, made subject to a tax or duty?" A single tax or duty may be imposed upon several persons with respect to a single estate held by them, but certainly not with respect to different estates.

Note also that Section 30 provides that "*the* tax or duty aforesaid shall be a lien and charge upon *the* property of every person who shall die, etc." It is still a single tax or duty which is to be a single lien and charge upon the whole of the property of the deceased.

It is true that in Section 30, after the sentence quoted above, are these words: "And every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to the beneficial interest therein (*sic*), shall pay * * * the amount of the duty or tax assessed upon such legacy or distributive share." This may seem to suggest the idea of several taxes upon the several legacies. But the words "such legacy or distributive share," in the singular, finds nothing in the previous language of the act to which to refer. Evidently there is nothing in the preceding language of Section 30, and in Section 29 there is but one reference to "legacies or distributive shares," and that is in the beginning and is in the plural. Apparently the first part of Section 30 is not as it was originally written, but it originally contained something to explain "therein" and and "such legacy or distributive share," which being stricken out leaves them unintelligible. The whole act is so badly drawn that it might well be argued, that it should be declared void because "insensible." It is not to be construed on the

theory that the draughtsman had throughout a clear conception of its purpose. The general lines may be clearly made out, as that a single tax or duty was intended to be imposed upon the person or persons having any estate in charge. That accords with the language with which Section 29 begins and, also, with the purpose as shown throughout the two sections. One or two inconsistent forms of expression cannot change the meaning in this respect. Can it be supposed that in the words last quoted every executor, administrator or trustee was directed to pay anything less than the entire tax or duty calculated upon all legacies or distributive shares in the estate? Before distribution to the legatees, the executor is to pay the duty or tax. This means one payment of a single amount. Read all through the section. There is nothing looking to several payments with respect to several legacies. The schedule or list is to contain "the names of *each and every person* entitled to any beneficial interest therein," and the tax "thereon," that is, the amount made up according to the schedule, showing *all legatees*, is to be immediately paid. The sentence beginning, "And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty," very clearly refers only to a single tax or duty in respect to any one estate. The collector is authorized to assess "the duty;" and to commence proceedings and subject "such property or *personal estate*" to be sold upon "*the judgment or decree*" of the court, and from the proceeds pay "such tax or duty;" and if a portion is sold the rest is discharged from the lien. This is all contrary to the thought that the intention was to impose several taxes or duties to be separately dealt with.

There is but one other bit of language which seems to suggest several taxes or duties upon, or with respect to, the several legacies, and that is the proviso at the end of subdivision "Fifth" in Section 29: "*Provided*, that all legacies or property passing by will, or by the

laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty." This occurs in that part of the act fixing the rates by which the tax or duty shall be figured. The only purpose of the proviso was, of course, to exclude legacies or property passing to husband or wife in calculating the tax. The implication in the words "shall be exempt from tax or duty" should not be permitted to override the words in the body of this section and the reading of the two sections as a whole. This is mere looseness.

In the light of the foregoing, the meaning of the words "the whole amount of such personal property" seems to us to become clear. Simplify the language by reading it as applied to a single executor under a will and Section 29 will read at the beginning as follows: "That any person having in charge, as executor, any legacies arising from *personal property*, where the whole amount of *such personal property* shall exceed \$10,000 in value, passing * * * by will, * * * shall be and is hereby made subject to a duty or tax." The legacies referred to are all the legacies given by the will—or, in other words, all the legacies which such executor has in charge. It would be absurd to change "legacies" to the singular, because a single person is the subject. A sole executor usually has in charge several legacies. So, if we change the form and read through with two or more persons, executors of the same will, as the subject, "any legacies" still means all the legacies under that will. *All legacies* are intended to be mentioned here, whether there is one executor or more than one, the whole section being framed as speaking of but a single estate and a single tax or duty.

Now, the personal property from which the legacies under any will arise is all the personal property of the estate. Exceptions to this rule are so rare that they need not be considered for purposes of construction. Hence, "personal property," where these words are first

used in this section means the whole personal estate ; so that if the limiting clause read simply " where such personal property exceeds \$10,000," it would, with reasonable certainty, mean " where the volume of personal property in the estate exceeds \$10,000." But somebody, apparently, thought that this might be doubted, and so the clause was made to read, not simply " where such personal property exceeds," but " where *the whole amount of* such personal property exceeds." These words, " the whole amount of," seem to have been intended to remove all doubt. From the suggestion of the Court it would appear that the doubt has arisen again. We submit that it cannot linger in the light which comes from the consideration that the section speaks of a single tax or duty upon or with respect to a single estate.

We presume it will not be questioned that whatever is the meaning of the words " the whole amount of such personal property as aforesaid," in the beginning of the section, the same meaning must be given to the words " the whole amount of said personal property," later on in the clause which we are asked to construe. And so we submit that in stating the minimum rates, according to relationship, as applicable " where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars," reference is, with respect to any particular estate, to the volume of the personal property in such estate, and that these rates are multiplied according to the size above \$25,000 of such volume of personal property.

The words in the first part of Section 29 " or any personal property or interest therein transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor " were apparently put in as an afterthought, and they are not skillfully fitted in. This is one of many blunders in composition and the use of language in this act. But it seems clear that with re-

spects to legacies the section has precisely the same meaning as if these words were omitted. For purposes of construction, as applied to legacies, they should be disregarded.

The view we take finds further support in the language of subdivision first: "Where the person or persons are entitled to *any* beneficial interest in *such* property." Each legatee or distributee is entitled to *some* beneficial interest in all the personal property. If any particular part may be considered as applied to pay his particular legacy, he has rather *the* beneficial interest in that. "*Any* beneficial interest" implies that *such* property is, or at least may be, larger than the interest. See, also, the further words fixing a certain rate for each dollar of the value "of *such* interest in *such* property."

See, also, the provision in Section 30 for sale of "*personal estate* or any portion of the same" in case of failure to pay the tax, and other provisions of that section hereinbefore referred to.

The order of the Court speaks of "the tax or duty imposed on each of the legacies." The question put is, whether the tax *so* imposed is measured by the volume of the estate, or by the amount of the legacy. We have sought to show that the personal property, which is in part the measure of the tax imposed by the Act, is the volume of the personal estate, without, up to this point, discussing upon what the tax is imposed. But we cannot well omit all comment upon the assumption contained in the question as put by the Court. Silence might be taken as assent. If that assumption is correct, that the act taxes each legacy, we see no possibility of escape from the conclusion that whether in form laid upon the legatees, as such, or upon the legacies, it is a tax on property, a direct tax, and therefore void, under the decision in the Income Tax

Case. We cannot believe, therefore, that the question put by the Court was worded with that idea in view. To assume that would seem to make the question itself wholly useless. There is no need of puzzling over the measure, if the tax is a direct tax and void. It would seem that the question, what is taxed by this law, or, in other words, what is the nature of the tax imposed, must still be open. Perhaps we are right in thinking that the Court is seeking aid in determining the nature of the tax, with a view to deciding the question of constitutionality. The measure of a tax often tells its real character. Is a tax imposed upon each legacy? Then a legacy of \$20,000 is taxed differently, according as it comes from an estate of \$10,000, \$25,000, \$100,000, \$500,000 or \$1,000,000. This is wholly unreasonable. There is no proper relation between the property taxed and the measure of the amount. Is the hypothesis correct? Although the theory that each legacy is taxed seems to lead to the conclusion which we seek—namely, a declaration that the act is unconstitutional, we do not think it correct. It seems to us, from the considerations hereinbefore set forth—especially the fact that the law seems to impose a single tax or duty with respect to each estate, and that the amount of the tax depends in part upon the amount of the entire personal estate—that the tax is a succession tax, a tax on the transmission of property at death, such as was before this Court in *Magoun vs. Illinois Trust and Savings Bank* and *United States vs. Perkins*. We cannot believe that this tax or duty, imposed as a single tax or duty with respect to the entire personal estate, measured by the entire personal estate, to be paid by the executors and charged in their general account, and made a lien and charge upon the entire personal estate, could have been intended by Congress, or can be regarded by the Court, as anything but a succession tax, or a tax upon the transmission of property on the death of the owner.

But if the Court should accept this view, rather than that which its question indicates, it must still, we submit, reach the same final conclusion and hold the act unconstitutional and void.

In *Magoun vs Illinois Trust and Savings Bank*, the Court say :

“ An inheritance tax is not one on property, but one on the succession. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege—and therefore the authority which confers it may impose conditions upon it.”

The law referred to here is State law. The Federal Government has nothing to say as to what shall become of property when the owner dies. But the power of the States is, according to the decisions of this Court, absolute and unqualified. The States, as a rule, pass property upon the death of the owner according to wills made by the owner or according to its statute of distribution in case of intestacy. What the State does by these laws is substantially to grant the property, all of which, according to the decisions of this Court, it might take to itself if it chose, to those named as donees in wills or to those designated in its statute of distributions. If the Federal Government is permitted to tax the succession, the transmission of property in case of death, it is permitted to destroy *pro tanto* the grant of the State, in respect to which it is said the power of the State is absolute and unqualified ; to interfere with the State in the exercise of its own exclusive functions. This cannot be. Such a tax cannot stand under the Constitution as interpreted by this Court. The Federal Government may tax property granted by the State after it has been received by the grantee. Such a tax is a direct tax, requiring apportionment. But it cannot in any way tax a grant from the State, or any exercise of the power of the State. And a tax upon the succession, or upon the devolution of property at the death of the owner, is substantially a tax upon a grant from the State, or upon a transfer operating wholly by force of State law.

That a State can tax only what is within its jurisdiction is said to be one of those "limitations upon the powers of all governments, without any express designation of them in their organic law ; limitations which inhere in their very nature and structure" (U. S. vs. R. R. Co., 106 U. S., 154).

A thing is as really without the jurisdiction of the Federal Government, if the State has exclusive jurisdiction over it, as is real estate wholly outside of the United States.

So it was held that the Federal Government could not tax the salaries of State Judges (Collector vs. Day, 11 Wall., 113).

This tax being a tax upon the succession or the transmission of property under State laws in case of death, and these matters being under the absolute and unqualified jurisdiction of the States, the act is unconstitutional and void under the doctrine stated by Chief-Justice MARSHALL in *McCulloch vs. Maryland*, 4 Wheat., 429, as follows :

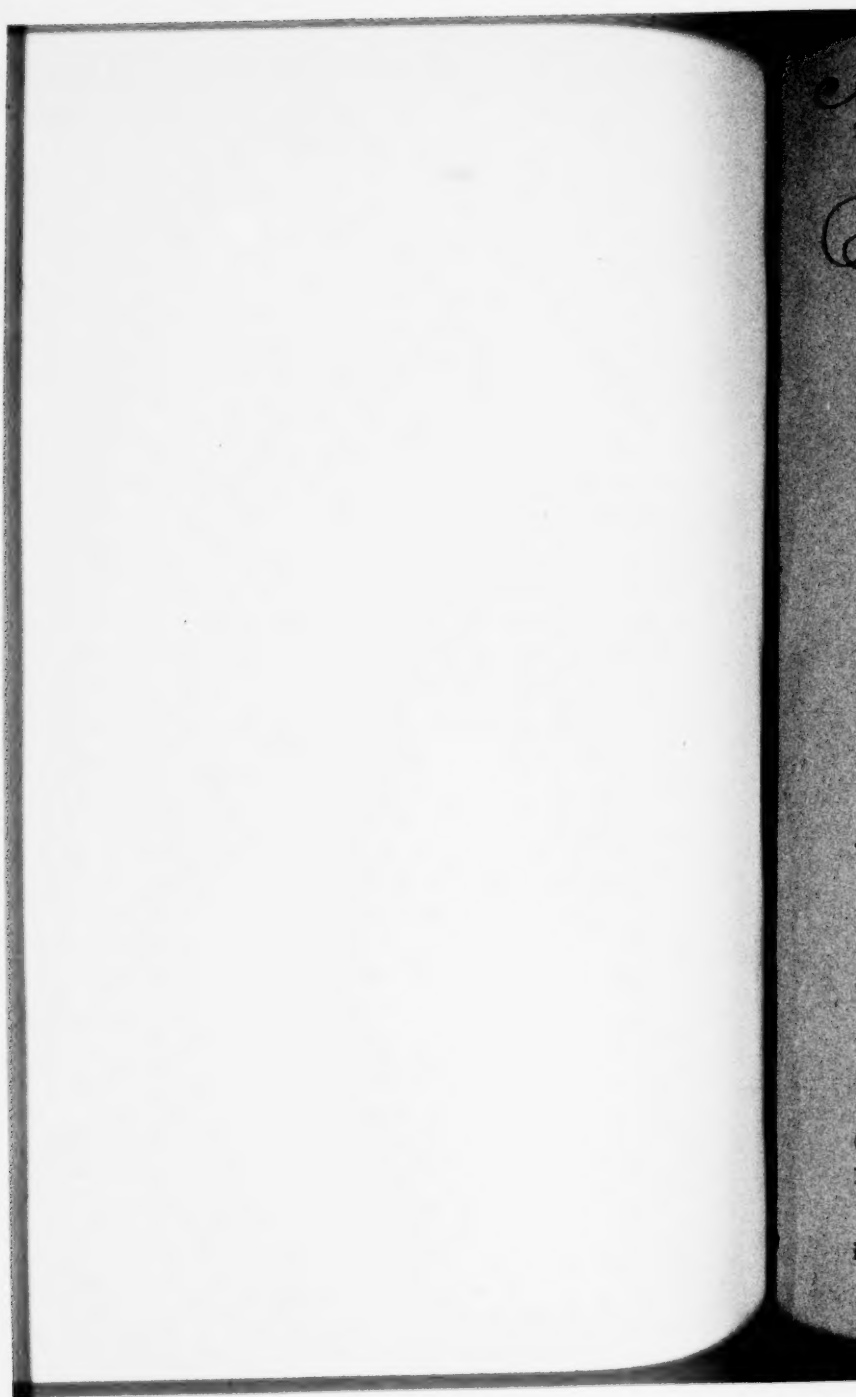
" All subjects over which the sovereign power of a State extends are objects of taxation ; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

THOMAS B. REED,

THOMAS THACHER,

Of Counsel for Appellants and Plaintiffs in
Error.





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Supreme Court of the United States.

Exs. of Carlisle heard on
Question by

No. 286.

SHIRLEY T. HIGH ET AL.,

Filed Mar. 12, 1900.

F. E. COYNE, Collector, &c., ET AL.,

Appellants.

No. 287.

EBEN J. KNOWLTON ET AL.,

Plaintiffs in Error,

vs.

FRANK R. MOORE, Collector, &c.,

Defendant in Error.

Additional Brief for Appellants and Plaintiffs
in Error on Question Submitted
by the Court.

J. G. CARLISLE,

For Appellants and Plaintiffs in Error.

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CHAMBERLIN.

Also Brief of HENRY M. WARD, for Appellants and Plaintiffs
in Error.



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PREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH ET AL.,
Appellants,

vs.

E. COYNE, Collector, &c., *et al.*,
Appellees.

No. 225.

EBEN J. KNOWLTON ET AL.,
Plaintiffs in Error,

vs.

FRANK R. MOORE, Collector, &c.,
Defendant in Error.

No. 387.

Additional Brief for Appellants and Plaintiffs in Error on Question Submitted by the Court.

The question propounded by the Court in these cases is "whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or by the amount of the legacy."

As we understand the act under consideration, the thing to be ascertained for the purpose of determining, first, whether the property is subject to any tax whatever, and, secondly, to determine the rate of the tax imposed, is the "whole amount" of the personal property held in charge or trust, from which the legacies and distributive shares arise; not the amount or value of any one share, but the aggregate amount or value of all the shares. Upon this point, the language of the act is so plain that there seems to be no room for construction. It reads:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares *arising from personal property*, where *the whole amount of such personal property as aforesaid* shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, (or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect, in possession or enjoyment, after the death of the grantor or bargainer), to any person or persons, or to any body or bodies, politic or corporate, in trust or other-

wise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows," etc., etc.

The clause we have put in parenthesis has no bearing on the question to be discussed. It was inserted for the purpose of subjecting to taxation personal property which the former owner had disposed of in his lifetime by deed, grant, etc., to take effect after his death, and which, therefore, might not be held in charge or trust by the administrator, executor or trustee. Whether property so situated ought or ought not to be included in the valuation is not a material question in these cases.

It is clear, we think, that the words "personal property as aforesaid" refer to the personal property held in charge or trust and from which all the shares arise; but, if we assume that the words "as aforesaid" relate back to the legacies or distributive shares, the meaning would not be changed in the least. With that construction, the clause would be understood as if it read, "Where the *whole amount* of such legacies or distributive shares shall exceed the sum of ten thousand dollars in actual value," and it would still be plain that the whole amount—the aggre-

gate amount—of all the legacies and distributive shares must be ascertained in order to determine whether the tax or duty shall be imposed; and, as the whole amount of the legacies and shares is precisely the same as the whole amount of personal property out of which they arise, the meaning and effect of the act are the same under either construction. The words “such personal property as aforesaid” certainly refer to either *all* the legacies and distributive shares, or to *all* the personal property held in trust or charge out of which they arise. There is nothing else to which they can possibly relate, and in either case it is the whole amount or value that is to be ascertained.

If the whole amount of the legacies or shares, or the whole amount of the personal property from which they arise (which is the same thing), exceeds ten thousand dollars in value, then, according to the subsequent provisions of the act, the shares are taxable at progressive rates which are regulated by the value of that whole amount. After the clause which we have quoted, the act proceeds to classify the beneficiaries, and prescribe the rates of taxation according to the degrees of relationship and the value of the

“whole amount of said personal property.” The first clause relating to this subject is as follows : “Where the *whole amount of said personal property* shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be,” etc., etc. To what personal property does this provision relate? Unquestionably it relates to the same personal property designated in the clause first quoted ; that is, to either the whole amount of the legacies and distributive shares held in charge or trust, or to the whole amount of the personal property out of which they arise, and, as we have seen, the effect is the same, no matter which construction is given to it. No grammatical or legal construction can be put upon it that would make it relate to the separate share of a legatee or distributee, for the obvious reason that there are no words intervening between this clause and the first part of the section conducing to show that the meaning of the phrase, “whole amount of said personal property,” was intended to be changed in any respect. If it had been intended to regulate or measure the rate of taxation by the amount or value of a single share or legacy, the language of the act is as obscure and inappropriate as could

possibly have been selected. In the first place, if such had been the intention, the words "whole amount of" were unusual and unnecessary; and, in the second place, the words "said personal property" would not have been used. There was nothing in the nature of the subject or in the rules of construction to require, or even excuse, the use of such phraseology in describing a single legacy or distributive share. A provision that "where any legacy or distributive share shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand, dollars," etc., etc., would have expressed the meaning so clearly that no question could have arisen; and, if it had been the intention to make the rate of taxation dependent upon the values of the separate shares, this, or some similar language, would undoubtedly have been used. But, instead of this, the words "whole amount of such personal property as aforesaid," "whole amount of said personal property" "such property," "said property," and "amount or value of said property," are used *ex industria* throughout the entire act, while the legacies and distributive shares, as such, are designated always as "beneficial interests *in such property*," thus pre-

serving in every clause of the act prescribing the rates of taxation a clear distinction between the separate legacies and shares and the whole amount of the property held in charge or trust out of which they arise.

The words "whole amount of" necessarily convey the idea of an aggregation or combination of things so as to constitute one body composed of all the parts. If a single legacy or share had been intended as the subject of valuation or as the measure of the tax, it is inconceivable that Congress should have employed the words in the plural, and then followed them by the plain provision that the whole amount of such personal property should be ascertained in order to determine whether the tax or duty should or should not be imposed, and to determine, if imposed, what the rate should be.

Having classified the beneficiaries and fixed the rates of taxation in cases where the whole amount of personal property shall exceed in value ten thousand and shall not exceed twenty-five thousand dollars, the act provides that :

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the

sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the *amount or value of said property* shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the *amount or value of said property* shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the *amount or value of said property* shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

Again we ask, what is referred to by the words "amount or value of said property" in this clause? It seems to us there can be but one answer: It is the amount or value of the same property referred to in the clause which designates the subject of taxation, and in the one which next precedes the classification of the beneficiaries; that is, the whole amount or value of the personal property held in charge or trust for the payment of legacies or distributive shares, or the whole amount or value of the personal property out of which they arise.

The rates referred to in the clause last quoted, and which are to be multiplied on account of the greater value of "said property," are the rates prescribed in the previous part of the act, where they are clearly regulated by the value of the whole amount of the personal property. In the absence of all evidence to the contrary, it must be conclusively presumed that Congress intended to apply the same rule of progression in this clause. The clauses are so connected by their phraseology and in their purpose that they must be accepted as constituting a single plan or scheme of progressive taxation, in which the aggregate value of the whole property is adopted as the measure of the tax or duty to be imposed. The rule prescribed in cases where personal property is valued between \$10,000 and \$25,000 was not intended to be abandoned in cases where the value exceeded that amount. Why should a share of \$10,000 taken out of an estate not exceeding \$25,000 be taxed, while a share of \$25,000 taken out of an estate valued at \$5,000,000 is not taxed? This result would follow if the court should hold that the words "amount or value of property," used in the last clause, do not mean the same as the words "the

whole amount of said property" used in the other clause, to which it refers in fixing the progressive rates.

Under the first clause prescribing the rates, it is clear that, if the whole amount of the property exceeds \$10,000 in value, every legacy or distributive share is taxed, no matter how small it may be; but if the words used in the last clause do not mean the same thing, but are to be so construed as to make the value of each share the measure of the rate in cases where the value of the whole personal property exceeds \$25,000, then every share not exceeding that amount in value, received out of such property will be exempted, because the only provision in the act imposing any rate of taxation upon property or upon shares not exceeding \$25,000 in value, is the first paragraph describing the rates, and these rates apply only to such shares as are taken out of estates valued at not less than \$10,000 nor more than \$25,000.

The only words in the act that could possibly be even plausibly relied upon to sustain a different construction from that we are insisting upon are, "passing, after the passage of this act, from any person possessed of such property, either by

will * * * to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise," etc., etc. There are two reasons, either of which seems to be conclusive, why these words cannot be held to refer to each separate legacy or distributive share. In the first place, the words quoted were not intended to describe or designate the amount of the property which was to be included in the valuation for the purpose of taxation, but were used only for the purpose of exempting from taxation property of decedents actually held in charge or trust at the time of the passage of the act. The section begins by providing that "any person or persons having in charge or trust as administrators, executors or trustees, any legacies or distributive shares arising from personal property," etc., etc. This provision speaks in the present tense, and if the act had contained no explanatory clause, the tax or duty would have attached at once to all the legacies or distributive shares, or all the personal property out of which they arose, *then* held in charge or trust; but such was not the purpose of Congress, and, consequently, a provision was inserted which made it clear that it was intended to tax only such shares or property

as might pass after the passage of the act. In order to present this part of the act in its strongest possible form in opposition to our contention, let us reconstruct it by placing the words "passing after the passage of this act" immediately after "any legacies or distributive shares." It will then read :

"Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares, passing after the passage of this act, * * * arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value," etc., etc.

In the second place, if the words quoted are to be so construed as to designate or describe the legacies and distributive shares, they expressly refer to the *whole amount* or value of such shares, and not to each one separately. In whatever intelligible form the provision may be put, the conclusion is inevitable that it was intended to value the whole property, and, if the value of the whole exceeded \$10,000, the tax or duty was to be imposed at the progressive rates thereafter prescribed in the act.

There is nothing in the act to show that it was

the purpose to exempt each legacy or share, or any legacy or share, not exceeding ten thousand dollars in value, if it was taken out of an estate exceeding that value, or to show that it was the purpose to make the value of any single legacy or share the measure of the rate of taxation. The words "whole amount of said property" are nowhere used in such connection with other language as to justify the conclusion that they were intended to designate a single share or legacy, and, to give them that construction would, it seems to us, be inconsistent, not only with the specific terms of the act, but with its general structure and evident purpose. If it is the value of the whole that determines whether there shall be any tax, it must be the value of the whole that determines the rate, for the two things are provided for in substantially the same language, and must therefore be dependent upon the same conditions. We are unable to see upon what ground it can be said that the same words do not mean the same thing when repeatedly and carefully used in the same act in reference to the same subject matter. But, if the exemption provided for in the act applies to each legacy or distributive share, and not to the personal prop-

erty as a whole, the question still remains whether a legatee or distributee who receives more than ten thousand dollars in value is entitled to any exemption at all? The act does not provide for the taxation only of values in excess of ten thousand dollars, but for the taxation of the entire value if it exceeds that sum. The consequence is that the uniformity required by the Constitution cannot be secured by holding that the exemption applies to each legacy or share, because one beneficiary who receives ten thousand dollars would pay no tax, while another beneficiary belonging to the same class who receives ten thousand five hundred dollars out of the estate of the same decedent would pay a tax, not merely on the five hundred dollars, but on the entire amount of his legacy. Admitting that Congress possesses the power to classify, and conceding, for the purposes of the present argument, that the classification made in this act is a proper one, we insist that the constitutional rule of uniformity requires that all the constituents of the same class who receive the same kind of property must be taxed alike.

But if the tax is "imposed upon each of the legacies," as the question put by the Court seems

to indicate may be the case, and is measured by the value of the share, why is it not clearly a direct tax on the property, or on the owner in respect of the property which, at the time the tax attaches, belongs absolutely to him under the laws of the State or Territory? The fact that the thing taxed, or in respect of which the tax is imposed, is called a "legacy" or "distributive share" cannot affect the character or incidence of the tax; nor can the character or incidence of the tax be affected by the fact that the property was acquired by the owner under a will or under the inheritance laws. If the tax or duty is not imposed on the privilege of transmitting the property, or on the privilege of receiving it, then it is unquestionably imposed on the property itself, or on its owner in respect of the property, for there is nothing else upon which it can possibly be imposed.

The executive department charged with the administration of this statute has from the beginning given to its provisions the same construction upon which we are now insisting. On the 15th of September, 1898, the Commissioner of Internal Revenue, in answer to a question

transmitted from the office of the Collector at Philadelphia, said :

" Mr. Fausset also asks if tax is to be computed on the whole amount of the estate or on the amount of each share. He instances the case of a person leaving by will a personal estate worth \$60,000 to his four children. He asks if the gross amount is to be divided by four and the tax computed at the rate of 75 cents on every \$100, or whether the value of the estate in its entirety is to be taken and the tax computed at the rate of \$1.12½ on the \$100.

" In answer, I have to say that the rate of tax is to be determined by the value of the whole amount of the personal property passing to an executor, or to beneficiaries direct. In the case specified, where the amount exceeded \$25,000 and did not exceed \$100,000, the rate of tax under each share would be \$1.12½ on each \$100 of clear value. * * *

" In conclusion, you state that you are 'unable to determine whether it is the intention of the act to in all cases exempt the sum of \$10,000, making the tax really on the excess of such amount.'

" In answer, I have to say that the sum of \$10,000 is exempt from taxation only in cases where the whole value of the personalty does not exceed \$10,000. If the personal property exceeds \$10,000 in value, the

tax accrues, though the aggregate amount of the separate shares distributed may fall considerably below \$10,000, owing to the deduction of expenses of distribution."

Syn. Tr. Dec. No. 20,061, 1898, Vol. 2,
P. 559.

The ruling made in the last sentence of this decision was afterwards abandoned, and the value of the whole amount of personal property held for the payment of shares, after deducting expenses of distributing, was adopted as the measure of the rate. On December 15, 1898, the Commissioner wrote the Collector at Omaha, Nebraska:

"This office is in receipt of a letter from Mr. M. B. Stuart, Lincoln, Nebr., under date of the 1st instant (who has to-day been referred to you), stating that his mother died in Connecticut on the 18th of last June; that the will was offered for probate in September, and asking whether or not said estate is subject to legacy tax.

"In reply, you will please inform him that, where the whole amount of personal property exceeds \$10,000 in actual value, passing from any person dying on or after June 13, 1898, taxes accrued thereon, and should be paid before distribution to the legatee, under section 29 of the war revenue act."

Syn. No. 20,437, 1898, Vol. 2, p. 1033.

Writing to the Collector, at Covington, Ky., December 15, 1898, he said :

“ You will please inform him that it is imperative that the return be made on the ‘ whole amount ’ of personal property passing from a person dying on or after June 13, 1898.” (see Regulations, Series 7, No. 3, revised pp. 4 and 5, for penalty for failure or neglect to deliver to Collector statement, etc.).

“ The fact that the legacy left to the widow is exempt from tax does not relieve the administrator or executor from making return to Collector, etc., of the whole amount of personal property passing under the will.”

Syn. No. 20,447, 1898, Vol. 2, p. 1042.

In a general letter of instructions to Collectors, dated January 14, 1899, the Commissioner said :

“ Upon the death of any person possessing at the time of death personal property, the whole amount of which remaining, after deduction of legal debts for distribution to legatees and distributees, exceeds in actual value the sum of \$10,000, such personal property will be regarded as having passed to the administrators, executors or trustees, and these officers will proceed to ascertain as soon as possible the whole amount of the decedent's personal property to be distributed to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise.

"The appraised value of the whole personal property of the decedent at the time of death should be first ascertained and stated in the return on Form 419, revised. The clear value of each legacy will be stated in the proper column, and the total of this column will equal the amount given as the appraised value of the personal estate. If, however, this total is less than the amount of the appraised value of the personal estate, the items which make up the difference should be furnished on a separate sheet of paper."

Syn. 20,548, 1899, Vol. 1, p. 111.

On the 18th of July, 1899, the Collector at Rochester, N. Y., was advised by the Commissioner that :

"The whole amount of personal property left for distribution after payment of legal debts and expenses determines the rate of tax imposed on legacies and distributive shares, under section 29 of the act of June 13, 1898, without regard to the amount or value of each legacy or share."

Syn. 20,587, 1899, Vol. 1, p. 163.

In response to questions asked by the Collector at Pittsburg, Pa., the Commissioner wrote, April 13, 1899 :

"Answering his contention that the personal property going to the widow is not to be included in making up the total value of

the estate for the purpose of taxation, I will say that the fact that a legacy going to the wife of testator is by statutory provision exempt from tax does not alter the further plain fact that such a legacy arises from personal property that is part of the 'whole amount' of personal property passing by the terms of the will, and in the opinion of this office it must be included with the other personal property in order to determine whether the entire amount passing is sufficient to subject to tax the other legacies passing under the will. To thus include the exempted legacy does not impair in any manner the value of the widow's interest under the will or deprive her of the full benefit of the exemption.

"To hold that it is not the whole amount of personal property passing from the decedent that is to be taken into calculation, but only the *whole amount so passing that is 'taxable,'* would be to read into the law words that, if such had been the intent of Congress, would have been used by them.

"As to the effect of the ruling which Mr. Church points out, that 'if a decedent's estate amounted to \$100,000, and he bequeathed it all to his wife with the exception of some specific bequests of \$2,000 or \$3,000 to others, it would compel the latter to pay just double the amount of taxes than if the decedent's estate was only valued at \$15,000, and all but \$2,000 or \$3,000 had been bequeathed

to his wife,' the answer is that, by the provisions of the act, *the rate of tax on legacies arising from large estates being made higher than on those arising from smaller estates*, there appears to be no reasonable ground for such a construction of the law as would result in the *escape from taxation of all legacies arising from the personal property of a rich estate* where the testator saw fit to bequeath his property to his widow, except an amount of \$10,000 or less, given as legacies to others."

Syn. 20,950, 1889, Vol. 1, pp. 695-6.

Under the act of 1864, all legacies and distributive shares held in charge or trust, and "arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of \$1,000, passing, after the passage of this act," etc., were subject to the tax or duty, and the official and practical construction was that the exemption did not apply to the legacies or distributive shares, but that, if all the shares exceeded \$1,000 in value, all were taxable, without regard to the value of each one. This construction of the statute was never questioned so far as we know, but was so well settled that Congress, in 1866, in order to prescribe a different rule for the minor children of a decedent, amended Section 124 of the act, by providing that :

“Any legacy or share of personal property passing, as aforesaid, to a minor child of the person who died, as aforesaid, shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of \$1,000, in which case the excess only above that sum shall be liable to such taxation.”

14th, U. S. S., page 140.

As to all other beneficiaries, neither the statute nor its construction was ever changed while the act remained in force.

In conclusion, we respectfully submit :

1. That the value of the whole amount of the personal property held in charge or trust by the executors, administrators or trustees—that is, the value of the whole amount of the personal property out of which the legacies and distributive shares arise—determines whether the tax shall or shall not be imposed.

2. That, if the value of the whole amount of the *same property* exceeds ten thousand dollars, then every part of it constituting a legacy or distributive share, except the share of a husband or wife, is taxed at the progressive rates thereafter prescribed; and,

3. That the rates of taxation are regulated throughout the act according to the value of the *same property* designated in its first clause.

J. G. CARLISLE,

For Appellants and Plaintiffs in Error.

Of Counsel:

WHEELER H. PECKHAM, PETER B. OLNEY, WILLIAM EDMOND CURTIS, CHARLES H. OTIS, WARD B. CHAMBERLIN and GEORGE F. CHAMBERLIN.

Supplemental Brief for Appellants and Plaintiffs in Error.

The progressive rate of taxation contained in the last paragraph of section 29 of the act is graded according to the value of the whole personal estate of the decedent, irrespective of the value of the legacy or beneficial interest of the legatee or next of kin.

In construing this section it must be borne in mind that like many other parts of the War Revenue Act it is adapted from the internal revenue law passed at the time of the Civil War. Sections 29 and 30 is almost a literal copy of the legacy tax of 1864 (13 U. S. Stat. at Large, pp. 285, 286), except for the following changes:

(1) In the first paragraph the words in the act of 1864 "where the whole amount of such personal property as aforesaid shall exceed the sum of *one thousand dollars*," are changed to read "where the whole amount of such personal property as aforesaid shall exceed the sum of *ten thousand dollars*."

(2) The following words *are added* at the end of the first paragraph: "*Where the whole amount*

of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be."

(3) The tax, instead of being at the rates of one, two, four, five and six dollars for every hundred dollars in value of the interests of the members of the various classes in paragraphs "First," "Second," "Third," "Fourth" and "Fifth" of Section 29, is at the rate of seventy-five cents, one dollar and fifty cents, three dollars, four dollars and five dollars "for each and every hundred dollars of the clear value of such interest."

(4) The following paragraph *is added* at the end of the section ;

" Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half ; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two ; and where the amount or value of said property

shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rate of duty *shall be multiplied by two and one-half*; and where *the amount or value of said property* shall exceed the sum of one million dollars such rates of duty *shall be multiplied by three.*"

In Section 30 the word "collector" is used in place of the word "assessor" in the former act.

The primary classification based upon the degree of relationship of the beneficiary to the decedent remains precisely as it was in the act of 1864 with the slight changes of rate just referred to. Section 29 is printed in full in Appendix B annexed, with the changes from the Act of 1864 indicated.

The Act of 1864 established a classification based solely upon the degree of kinship between the legatee and the testator, and based, as we may assume for the argument upon a distinction between the members of the various classes which had a just and proper relation to the subject matter of the tax, be that subject matter the legacy itself or the right or the privilege of succession. That act taxed every legacy "where the whole amount of such personal property"—*i. e.*, the estate in the hands of the executors from

which the legacies arose—exceeded the sum of one thousand dollars. If the whole estate did in fact exceed one thousand dollars, every legacy, whatever its amount, was taxed at a rate which was not in any way dependent upon the amount of the legacy, but solely upon the relationship of the legatee, with the proviso that all legacies or property passing to the husband or wife should be exempt.

In the Act of 1898, however, the general language of the first paragraph of Section 29, imposing a tax upon "any person" having in charge any legacies or distributive shares "*arising from personal property, where the whole amount of such personal property shall exceed the sum of ten thousand dollars,*" is, by the phrase at the end of the first paragraph, limited to those cases only "*where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand, dollars.*"

All the paragraphs numbered "First," "Second," "Third," "Fourth" and "Fifth," in which the primary classification upon the basis of kinship is contained, are controlled by this phrase, and hence apply only to estates of between

\$10,000 and \$25,000. We here the state of the decedent is between these limits every legacy or beneficial interest is taxed, whatever its value. Obviously, in an estate of less than \$25,000 no legacy can exceed that amount; but, however small the legacy may be, if the whole amount of personal property in the hands of the executor, from which the legacy arises, is between the limits stated, the legacy is taxed according to the kinship of the various classes of legatees. Each member of any class is taxed at the same rate upon his legacy. The variation in the rate has, however, no relation whatsoever to the value of the legacy, but is determined solely by the relationship of the legatee.

If, then, we eliminate for the moment all reference to the subsequent clause containing the progressive or graded rates, we find in the section a complete scheme for taxing all legacies, whatever their amount, arising from estates of between \$10,000 and \$25,000 in value. A careful distinction is made and preserved throughout between the entire estate in the hands of the executor, which is termed "the whole amount of such personal property," "such property," "the whole amount of said personal property," and

again "such property," and the legacies or distributive shares of legatees or next of kin, which are spoken of as "legacies or distributive shares arising from personal property," "beneficial interest in such property" and "such interest"—words general enough to include in addition to legacies and distributive shares the beneficial interest of a *cestui que trust* in property in the hands of a trustee.

But, as we have said, the section so far does not purport to impose a tax upon any interest or legacy, whatever its value, where the whole amount of the decedent's property is greater in value than \$25,000. That is reserved for the last paragraph by which the progressive rates are enacted.

There is not a word in the paragraphs fixing the initial rates based on kinship to lead one to infer that such rates are intended to apply to legacies of any particular value; on the contrary, they apply by the terms of the first paragraph to all legacies where the whole property in the hands of the executor is between \$10,000 and \$25,000. While legacies of \$10,000 or less are not taxed where the whole property is \$10,000 or less, when it is over \$10,000 and less than \$25,-

ooo, every legacy from \$1 to \$25,000 is taxed and the rate is determined solely by the degree of kinship of the legatee.

What then is the meaning of the last paragraph of the section containing the progressive rates? We insist that it can have only one meaning; that is, that the rates are graded by the size of the whole personal property in the hands of the executor from which the legacies arise. The question hinges upon the meaning of the words "said property" occurring four times in similar connection in the phrase "where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000," etc.

These words, "said property," must necessarily relate back to the "property" which has been already described in the introductory part of Section 29 as the general subject matter of the tax, that is to say, the entire amount of personal property in the hands of the executor out of which the legacies arise. But it may be contended that, while the words "where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000," refer to the entire

estate out of which the various legacies arise, yet that the words "amount or value of said property" in this last paragraph imposing the progressive rates refer to the separate legacies.

Let us look at the whole act giving this construction to these words: If the words "said property" mean "any legacy or distributive share" so that this last paragraph is to be construed as if it read:

"Where the whole amount or value of *any legacy or distributive share* shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by $1\frac{1}{2}$; and where the amount or value of *any legacy or distributive share* shall exceed the sum of \$100,000, but shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by 2; and where the amount or value of *any legacy or distributive share* shall exceed the sum of \$500,000, but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by $2\frac{1}{2}$; and where the amount or value of *any legacy or distributive share* shall exceed the sum of \$1,000,000 such rates of duty shall be multiplied by 3."

Then under this construction we have in the act a most extraordinary and purely arbitrary clasification, for while the initial rates based upon

kinship are imposed upon every legacy, however small, where the whole estate is between \$10,000 and \$25,000, yet, where the whole estate is over \$25,000 and the progressive rates are imposed according to the size of the legacy, there is no tax on any legacy, interest or distributive share unless its value is greater than \$25,000.

We would thus have an act which would first declare in plain unambiguous words that all legacies are taxed where the whole amount of personal property from which they are derived is greater than \$10,000, this would fix the rate of taxation upon all beneficial interests of legatees derived from estates of between \$10,000 and \$25,000 only, without any reference to the amount or value of the legacy, and then establish a third classification based upon the value of the legacies, affecting not all legacies, but only legacies of from \$25,000 to over \$1,000,000. Under this construction take as an instance an estate of \$100,000 divided into five legacies or distributive shares of \$20,000 each. These legacies could not be taxed at any of the rates of $\frac{3}{4}$, $1\frac{1}{2}$, 3, 4, and 5 per cent., for those rates apply only to legacies arising out of a whole amount of personal property" in the hands of an executor of between

\$10,000 and \$25,000 in value. They could not be taxed at any of the progressive rates, for those rates would apply only to legacies of over \$25,000, and each of these legacies is only of \$20,000 in value. And so a testator having an estate of \$1,000,000 might escape the entire tax by bequeathing 41 legacies, each under \$25,000. We shall not waste time by multiplying instances of the gross inequalities and absurdities which would follow from this construction.

We do, however, insist that if the words "amount or value of said property" in this paragraph refer to the separate legacies or shares, the construction we have just made of the whole act cannot be avoided, and every legacy of less than \$25,000 would be exempt, except only where the whole estate was between \$10,000 and \$25,000, when every legacy, however small, would be taxed. Such a result needs only to be suggested and proved to be the necessary result of that construction to carry its complete refutation, but there are certain considerations which remain to be urged against it. First and most important is the point that it violates the obvious intent and purpose of the act, to tax every legacy or distributive share where the whole amount

of personal property from which the legacy is derived is more than \$10,000; second, it violates the ordinary rule of grammatical and legal construction that a word once defined in a statute must bear the same meaning throughout the act, unless such meaning does violence to the context; third, the practical effect is to exempt an enormous amount of property from taxation; whereas, by the construction which we adopt, the purpose of the act is carried out and every legacy or share taxed where the estate is over \$10,000 in value, and, finally, the language used is too plain to admit of any serious question; and, where the legislative body has used apt and definite words, it is not the province of any court to give these words a forced and unnatural construction.

We may further suggest that the use of the words "whole amount of such personal property," instead of the words "whole value of the personal estate of the decedent," was intentional, and is a clear recognition by Congress of the just principle that only what remains of an estate for the payment of legacies—that is to say, the balance for distribution after the payment of debts and expenses of administration—should be

taken as the basis of assessment, and, if such balance should not exceed \$10,000, no tax should be charged. Certainly, when viewed in this light, the phrase "whole amount of such personal property" is an apt and short method of designating this balance, which must otherwise be designated by some such phrase as "the whole value of the personal estate of the decedent after payment of debts and expenses of administration." The words "whole amount of personal property" are the same as those used in the Act of 1864, where their meaning is entirely free from doubt.

We can conceive of a third construction being suggested for Section 29; that is, that the words "where the whole amount of said personal property," in the last clause of the first paragraph, mean not the whole amount of personal property from which the legacies arise, but the separate legacies or shares themselves, and that the words "amount or value of said property," in the subsequent paragraph, establishing the graded rates, also mean the separate legacies or shares. Adopting, for the argument, this construction, and substituting the words "any legacy or distribu-

tive share," this clause and the last paragraph would read :

"Where *the whole amount of any legacy or distributive share* shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be," etc.

"Where the amount or value *of any legacy or distributive share* shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one-half," etc.

But this last construction, we insist, cannot be adopted because, first, it violates the ordinary natural meaning of the language to say that the words "the whole amount of said personal property," which relate back to the property just described—that is, the whole amount of personal property in the hands of the executors from which the legacies arise—mean the same thing as the separate legacies. It is tantamount to saying that the whole is equal only to one of its component parts. Second, such a construction would establish a classification of all legacies *from \$10,000 to over \$1,000,000, but would exempt all legacies of less than \$10,000.* This would be directly contrary to the language of the first few

lines of the first paragraph, which say that *all legacies* where the whole amount of personal property from which they are derived is over \$10,000 shall be subject to that tax. Third, if the word "property" means "legacy" it is inconceivable that the careful distinction should be made in the paragraphs numbered "First," "Second," "Third," "Fourth" and "Fifth" between the "property" in the hands of the executor and the "interest in such property" of the legatee or next of kin.

In short, we submit that there is only one construction under which the whole act can be made consistent and by which effect can be given to every word. That is, that the rate is graded according to the size of the whole estate, and, where the whole estate is over \$10,000, every legacy is taxed at a rate based primarily upon the relationship of the legatee, and secondarily upon the value of the whole amount of personal property in the hands of his executors, administrators or trustees from which legacies and distributive shares arise.

In Appendix A we have submitted certain extracts from the debates in Congress (Congressional Record, Vol. 31, Part VI., May 20, 1898)

when the tax was under discussion, which make it it entirely clear that the intent of that body was to impose the highest rate of tax upon the largest estates without regard to the value of the legacy. In Appendix B we have set forth Section 29 of the act with the words added to the Act of 1864 (13 U. S. Stat. at Large, pp. 285, 286) printed in heavy-faced type and the words omitted from it in italics and enclosed in brackets.

HENRY M. WARD,

For Appellants and Plaintiffs in Error.

APPENDIX A.

Senator LODGE. There is another point that I desire to ask about. I may be wrong in my interpretation of the bill, but what appears to me to be the case is that if a man inherits \$100,000 from an estate of \$200,000 he pays one tax. If he inherits \$100,000, exactly the same amount, from an estate of \$1,000,000, he pays a much heavier tax. The man who inherits \$100,000 from the estate of \$1,000,000 may be a poor man, and the man who inherits \$100,000 from the estate of \$200,000 may be a rich man, and yet the man inheriting the \$100,000 from the estate of \$1,000,000 pays two and a half times as much; that is, the tax appears to be levied upon the original estate without any reference to the beneficiaries. I do not see why \$100,000 in a legacy should pay more coming from an estate of one size than coming from an estate of another size.

Mr. WOLCOTT. I should like to ask the Senator from Massachusetts if he does not believe, in view of some of the enormous accumulations of fortunes in this country, out of which the personal property pays practically nothing in taxation during the life of the owner, it is inequitable that a personal estate of \$5,000,000 should pay a greater sum proportionately to the Government than an estate of \$20,000?

Mr. LODGE. That opens up the whole question of a graduated tax. I believe, as a matter of sound taxation, the object is to tax the dollar and not the man. I believe the dollar should be taxed, whether it is \$1 in twenty thousand or \$1 in five million.

Now, I favor an inheritance tax as a principle of taxation. We have an inheritance tax on collateral inheritances in my own State, from which last year we collected over \$500,000. It is only applied to collateral inheritances, but it is an important branch of revenue in my State. I think it was a wisely-imposed tax, that it is a

wise law, and very possibly it might be carried further. I think also that it is a tax which ought to be left to the State and not taken by the United States. But I fail to see the justice of taxing a man who gets perhaps \$5,000 as a small bequest from an estate of a million dollars. Perhaps it is all that he has. When that is left him by a person possessing a million-dollar estate, why should he pay two and a half times as much tax as a man who gets precisely the same amount from a smaller estate?

I agree it seems on the surface proper that a large estate should pay more than a small estate, and if the tax was graded in that way it might be open to less objection. But this is graded so as to tax the legacies on a different scale. The object is, of course, to reach the property; and it seems to me that where the legacy is the same, a man should not be forced to pay more on the same amount because he happens to receive his legacy from a larger estate.

* * * * *

The PRESIDING OFFICER. The question is, first, on the amendment of the Senator from Colorado [Mr. WOLCOTT] to the amendment of the committee.

Mr. WOLCOTT. To insert "ten" instead of "five."

Mr. LODGE. I thought that had been disposed of.

The PRESIDING OFFICER. The amendment to the amendment will be stated.

The SECRETARY. In line 20, page 66, strike out "five" before "thousand" and insert "ten;" so as to read:

That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, etc.

The amendment to the amendment was agreed to.

Mr. FAULKNER. And on page 67, line 6, the same amendment is to be made.

The SECRETARY. On page 67, line 6, strike out "five" and insert "ten" before "thousand" so as to read:

Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be.

MR. CHANDLER. I wish to inquire whether the limitation on the amount is a limitation as to the whole estate or as to the individual legacy.

MR. WOLCOTT. It is only the personal estate, I will say to the Senator.

MR. CHANDLER. The provision is:

Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be.

Does that mean the whole estate, or only the individual legacy?

MR. WOLCOTT. The whole estate.

MR. CHANDLER. Suppose a man has \$100,000. He cannot give ten legacies of \$10,000 each without paying the tax?

MR. WOLCOTT. It applies to the whole estate.

MR. CHANDLER. If the whole estate which is bequeathed by the testator should amount to \$10,000, is every legacy, however large or small, taxable?

MR. WOLCOTT. Certainly. The amount of the tax on it is determined by the totality of the personal property left. If it be \$10,000, then it is taxable, however small or large the legacy may be.

MR. SPOONER. It might be a million dollars.

* * * * *

MR. WOLCOTT. The experience of the last twenty-five years of this country has demonstrated without a doubt that live men with large properties can always evade the taxgatherer so far as their personal estate is concerned. The Senator knows, and I know, of men worth a million dollars of personal property who pay

practically no taxes whatever. In the great State of New York a bill to tax inheritances was vetoed by its governor because it would drive people out of that State into New Jersey and other States for a legal residence. It is because the law cannot reach such persons when they are alive that we propose to enact into law now a general provision which will reach every State in the Union, and which will say that these great estates shall not be passed down without the Government getting its fair share by the imposition of a tax on these great properties which it has protected through all these years. That is why it was done. If we could reach the living man we would do so, but we cannot. The tax collectors have not been able to do that for years, and the Senator must know that.

* * * * *

MR. WOLCOTT. Is the Senator aware that this tax was on the statute books for years and was very admirable in collecting revenue during war times?

MR. ELKINS. We had a great big war on hand then, no such an affair as this.

MR. GORMAN. I should like to ask the Senator from Colorado where he finds the taxes to which he refers? Were they imposed in 1862? I have been unable to find any such provision.

MR. WOLCOTT. It was in 1864, and the provision is reproduced word for word here, except that we have made the legacy tax higher for the larger estates and lower upon smaller estates. Otherwise it is the same as the law of 1864.

APPENDIX B.

LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL
PROPERTY.

SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of **ten thousand** [*one thousand*] dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say : **Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty five thousand dollars the tax shall be :**

“First : Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of **seventy-five cents** [*one dollar*] for each and every hundred dollars of the clear value of such interest in such property.

“Second : Where the person or persons entitled to any beneficial interest in such property shall be the descendent of a brother or sister of the person who died possessed, as aforesaid, at the rate of **one dollar and fifty cents** [*two dollars*] for each and every hundred dollars of the clear value of such interest.

“Third : Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant

of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of **three** [*four*] dollars for each and every hundred dollars of the clear value of such interest.

"Fourth: Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of **four** [*five*] dollars for each and every hundred dollars of the clear value of such interest.

"Fifth: Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of **five** [*six*] dollars for each and every hundred dollars of the clear value of such interest:

"*Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"Where the amount of value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum of value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount of value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

N^o. 387.

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NOV 28 1899

JAMES H. MCKENNEY,
Clerk.

Brief of Carlisle for P. E.
Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Nov. 28, 1899.

EBEN J. KNOWLTON and THOMAS
A. BUFFUM, as Executors of and
under the last Will and Testa-
ment of Edwin F. Knowlton, de-
ceased,

Plaintiffs in Error,

against

No. 387.

FRANK R. MOORE, as United
States Collector of Internal Rev-
enue, First District, State of
New York.

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES H. OTIS,

Attorney for Plaintiffs in Error.

JOHN G. CARLISLE,

Of Counsel.



Supreme Court of the United States.

OCTOBER TERM, 1899.

EBEN J. KNOWLTON and THOMAS A.
BUFFUM, as Executors of and under
the last Will and Testament of Edwin
F. Knowlton, deceased,

Plaintiffs in Error,

against

FRANK R. MOORE, as United States
Collector of Internal Revenue, First
District, State of New York,

Defendant in Error.

No. 387.

STATEMENT.

Plaintiffs in Error filed their amended complaint in the Circuit Court of the United States for the Eastern District of the State of New York on the first day of June, A. D. 1899, against Frank R. Moore, as United States Collector of Internal Revenue, First District, State of New York, to recover the sum of \$42,084.67-100 with interest from the 18th day of April A. D. 1899.

The amended complaint alleges the official position of the Defendant in Error; the death of Edwin F. Knowlton on the 25th day of October A. D. 1898, leaving a will, a copy of which was annexed to the amended complaint (Record, fols. 11 to 25). By his will, the testator made certain bequests hereinafter specified, and

appointed Plaintiffs in Error executors thereof. Said will was admitted to probate, and said executors qualified on November 14, 1898.

The total value of testator's personal estate passing to legatees was \$2,559,899.67.

On March 31, 1899, Plaintiffs in Error, upon demand of the Defendant in Error made a schedule of legacies and of the taxes claimed thereon, as required by Section 30 of the Act of Congress of June 13, 1898, entitled: "An Act to provide Ways and Means to "meet War Expenditures and for other purposes," of which statement a copy is annexed to the complaint. (Record, fols. 29 to 32.)

From this statement, or schedule, it appears that legacies were bequeathed by said will to natural persons and corporations of the values respectively, and taxed respectively as follows:

Names of persons entitled to beneficial interest in said property.	Relationship of beneficiary to person who died possessed.	Clear value of legacy.	Legacies exempt.	Amount taxable.	Rate for every \$100.	Amount of tax.
Mary, Countess von Francken Sierstorpff.....	Daughter.					
Furniture.....						
Cash legacy.....						
Income for life on residuary estate, amounting to \$2,348,734.67. Countess Sierstorpff became 28 years of age on July 2, 1898. Present value of her life interest in said residuary estate, estimated according to United States tables, is.....						
Total.....		\$1,731,996.35		\$1,731,996.35	2.25	38,969.92
George W. Knowlton.....	Brother.....	100.00		100.00	2.25	2.25
Charlotte A. Bachelor.....	Sister.....	5,000.00		5,000.00	2.25	112.50
Eben J. Knowlton.....	Brother.....	100,000.00		100,000.00	2.25	2,250.00
Unitarian Church of West Upton, Mass.....	None.....	5,000.00		5,000.00	15.	750.00
The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same or their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is \$717,803.30.....		717,803.30				
Total.....		\$2,559,899.65		\$1,842,096.35		42,084.67

Plaintiffs in Error protested, in writing, against the assessment of any tax, upon the following grounds:

"1. The provisions of the act of Congress under which it is sought to impose, assess, and collect the said tax or duty are in violation of the provisions of Article I, Sections 8 and 9, of the Constitution of the United States, and are, therefore, void.

"2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if such provisions be not unconstitutional and void.

"3. The legacy to Eben J. Knowlton, a brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of \$1.12½ per \$100, and not at the rate of \$2.25 per \$100, even if said act be not unconstitutional and void.

"4. We hereby declare that the rates and amounts of the tax or duty above set down were so set down in the foregoing statement at the direction of the Collector of Internal Revenue for the first district of New York, and we hereby protest against such direction."

The Defendant in Error made return of the said statement and protest to the Commissioner of Internal Revenue, who, on April 12, 1899, assessed against the Plaintiffs in Error a tax of \$42,084.67, as above set forth, and transmitted the same to the Defendant in Error for collection.

On April 12, 1899, the defendant, as Collector, caused to be served upon the plaintiffs a notice in writing that the said tax had been assessed, and demanded payment.

On April 17, 1899, plaintiffs caused to be delivered to the defendant a further written protest against the assessment of the said tax upon the same grounds above stated, and refused to make payment of the same.

On April 17, 1899, plaintiffs received from the defendant a notice threatening the addition of five per cent. penalty and issuance of dstraint warrant, unless the tax were paid.

(Exhibit "E," Record, fols. 35, 36).

On April 18, 1899, under compulsion of the said threat, and to prevent the addition of the penalty, and to prevent issuance and execution of distraint warrant to enforce the collection of the tax, plaintiffs paid the tax to the defendant, under protest, by their certified check and at the same time delivered to the defendant, a further protest in writing upon the same grounds above set forth.

(Exhibits "F" and "G." Record, fols. 38 to 41).

Upon the delivery of the said certified check of \$42,084.67 the defendant delivered to the plaintiffs duplicate receipts therefor, showing that the payment had been made under protest.

(Exhibit "H," Record, fol. 41).

On April 20, 1899, plaintiffs made an appeal in writing to the United States Commissioner of Internal Revenue to remit, refund, and pay back to them the amount so paid under protest, stating the grounds upon which said refund and repayment were requested, substantially as above set forth.

(Exhibit "I," Record, fols. 42 to 48).

On May 8, 1899, the United States Commissioner of Internal Revenue denied and rejected the said appeal and claim of the plaintiffs, and refused to remit and refund the said tax or any part thereof, and the defendant, on May 10, 1899, caused to be served upon the plaintiffs a written notice of such denial and rejection.

(Exhibits "J" and "K." Record, fols. 48, 49.)

The amended complaint then alleges :

That "the said alleged assessment and tax are wholly illegal, "null and void and of no force or effect for that the provisions "of the aforesaid Act of Congress under which it was sought "to impose and assess the said duty or tax are unconstitutional and void and especially are in direct violation of the "provisions of Article I, Sections 8 and 9 of the Constitution "of the United States, which are as follows: Art. I, Section "8. The Congress shall have the power

"Sub. 1. To lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense "and general welfare of the United States; but all duties, "imposts and excises shall be uniform throughout the United "States.

" Art. I, Section 9, Sub. 4. No capitation or other direct
 " tax shall be laid unless in proportion to the census or enum-
 " eration hereinbefore directed to be taken."

Judgment was demanded for \$42,084.67 with interest.

The defendant by George H. Pettit, United States Attorney for the Eastern District of New York, filed a demurrer to the said amended complaint upon the ground " that it appears on the face
 " of said amended complaint that the same does not state facts suffi-
 " cient to constitute a cause of action."

The issue of law thus raised came on for argument, in the United States Circuit Court for the Eastern District of New York, before Hon. Edward B. Thomas, in July, A. D. 1899. On the 17th day of July, A. D. 1899, an order was entered directing that the demurrer be sustained and dismissing the amended complaint with costs to the defendant, which were taxed at Thirteen 10-100 dollars. On the 19th day of July, A. D. 1899, judgment was entered accordingly.

Following is a copy of Section 29 of the War Revenue Law, taxing legacies and distributive shares.

**"LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL
 PROPERTY.**

" Sec. 29. That any person or persons having in charge or
 " trust, as administrators or executors, or trustees, any lega-
 " cies or distributive shares arising from personal property,
 " where the whole amount of such personal property as afore-
 " said shall exceed the sum of ten thousand dollars in actual
 " value, passing, after the passage of this act, from any person
 " possessed of such property, either by will or by the intestate
 " laws of any state or territory, or any personal property
 " or interest therein, transferred by deed, grant, bargain, sale,
 " or gift, made or intended to take effect in possession or en-
 " joyment after the death of the grantor or bargainer, to any
 " person or persons, or to any body or bodies, politic or cor-
 " porate, in trust or otherwise, shall be, and hereby are,
 " made subject to a duty or tax to be paid to the United
 " States, as follows—that is to say : Where the whole amount
 " of said personal property shall exceed in value ten thousand
 " and shall not exceed in value the sum of twenty-five thou-
 " sand dollars the tax shall be :

*“First—*Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor brother or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

*“Second—*Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

*“Third—*Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

*“Fourth—*Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

*“Fifth—*Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any state or territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

“Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said

“property shall exceed the sum of one hundred thousand
 “dollars, but shall not exceed the sum of five hundred
 “thousand dollars, such rates of duty shall be multiplied by
 “two; and where the amount or value of said property
 “shall exceed the sum of five hundred thousand dollars, but
 “shall not exceed the sum of one million dollars, such rates
 “of duty shall be multiplied by two and one-half; and where
 “the amount or value of said property shall exceed the sum
 “of one million dollars, such rates of duty shall be multi-
 “plied by three.”

Assignment of Errors.

I. The Court erred in holding that Sections Twenty-nine and Thirty of the Act of Congress, approved July 13, 1898, entitled, “An Act to provide Ways and Means to Meet War Expenditures, and for other Purposes,” which provided for the imposition, assessment, and collection of a tax on the personal property belonging to the estates of decedents, when the same exceeded Ten thousand dollars in value, were not enacted in violation of Article 1, Section 9, Subdivision 4 of the Constitution of the United States, which provides that “No Capitation or other Direct Tax shall be laid unless in Proportion to the Census or Enumeration hereinbefore directed to be taken.”

II. The Court erred in holding that the taxes or duties imposed by the said Sections Twenty-nine and Thirty were uniform throughout the United States, and therefore were not enacted in violation of Article I, Section 8, Subdivision I of the Constitution of the United States, which provides that the Congress shall have the power “To lay and collect Taxes, Duties, Imposts, and Excises; to pay the Debts, and provide for the Common Defense and General Welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States.”

III. The Court erred in sustaining the demurrer to the amended complaint.

IV. The Court erred in not overruling the demurrer to the amended complaint.

V. The Court erred in dismissing the amended complaint and rendering judgment against the plaintiffs.

This brief discusses but one of the grounds of the unconstitutionality of the United States Succession Tax law, namely—

Assuming the tax to be indirect, it violates the Constitutional restriction that “all duties, imposts and excise shall be uniform throughout the United States.”

We contend:

1. That the word “uniform” in the constitutional provision quoted is synonymous with “equal.”
2. That the so-called “geographical” sense in which the word “uniform” is used, is, that the indirect tax imposed shall be “uniform” in every part of the United States, considered as one government; not, that it may be inherently unequal in any single state, if the same inequality be maintained throughout all other states.
3. That independently of any constitutional restriction, approximate equality is an inherent and essential condition of all taxation.
4. That the Act in question necessarily discriminates against the rich, in that it taxes the rich at a higher *rate*, the *rate* increasing as the *amount* of taxable property increases, and
5. Attempts to create taxable classes, based upon wealth, varying the *rate* of tax upon the *same kind of taxable property* in the hands of the *same class of taxable persons*; according to the *amount of taxable property* received by them.

POINTS.

I.

If the tax sought to be imposed by Sections 29 and 30 of the War Revenue Law, be an indirect tax and subject only to the constitutional restriction that “all duties, imposts, and excises shall be uniform throughout the United States,” the tax is not uniform, and is therefore void.

- a. *What is the true meaning of the words “uniform throughout the United States,” as used in the Constitution?*

The Standard Dictionary, Vol. II, p. 1971.

“Uniform a. * * *

“ 4. Law. Conforming to one unvarying rule or standard ;
 “ operating equally on all persons or all property within a
 “ given jurisdiction ; as a *uniform* rule of construction ; a uni-
 “ form law of taxation.”

The earliest case in this court in which this subject was discussed is *Hylton vs. United States*, 3 Dallas, 171, decided in the year 1795, only six years after the United States Constitution took effect. The decision was participated in by three justices, Ellsworth, Paterson, and Wilson, who had been members of the Constitutional Convention. Their interpretation of the constitutional provision in question has especial value, by reason of its proximity in time to the adoption of the Constitution.

At page 180, Mr. Justice Paterson writes :

“ Apportionment is an operation on States, and involves
 “ valuations and assessments, which are arbitrary, and should
 “ not be resorted to but in case of necessity. *Uniformity is*
 “ *an instant operation on individuals*, without the interven-
 “ tion of assessments, or any regard to States, and is at once
 “ easy, certain, and efficacious.”

At page 181, Mr. Justice Iredell writes :

“ If it can be considered as a tax, neither direct within the
 “ meaning of the Constitution, nor comprehended within the
 “ term duty, impost, or excise, there is no provision in the
 “ Constitution, one way or another, and then it must be left
 “ to such an operation of the power, as if the authority to lay
 “ taxes had been given generally in all instances, without say-
 “ ing whether they should be apportioned or uniform ; and in
 “ that case, I should presume, the tax ought to be uniform ;
 “ *because the present Constitution was particularly intended to*
 “ *affect individuals, and not States*, except in particular cases
 “ specified. And this is the leading distinction between the
 “ articles of Confederation and the present Constitution.”

Pomeroy's Constitutional Law (Bennett's Edition), Section
 280 :

“ Imposts, duties and excises, whether laid upon imported
 “ goods, upon the instruments of foreign commerce, or upon
 “ internal articles, productions and labor, are only required to
 “ be uniform throughout the United States ; that is, the *rate*

“fixed for any article or subject must be the same in all parts of the country. It is not necessary that all articles should be subjected to the burden, or that all upon which a tax is laid should bear the same rate. But when a rate has been determined for any one subject, that must be retained for the same species in all the States. Neither is it necessary to ascertain at the outset the total amount to be raised, or to divide it among the States. In laying and collecting indirect taxes, the Government touches the individual apart from any of his relations to the State of which he is an inhabitant.”

Section 287 :

“When Congress sees fit to lay and collect duties upon imported goods, they may demand any amount which is deemed proper in their own discretion. The only limit upon their power is that they must fix the same rate for the same article in all parts of the country. Uniformity is the constitutional rule.

*“ * * * * * When Congress resorts to the system of excises, they may demand any percentage of incomes, any sums as license fees for carrying on particular business, any portion of the amounts paid upon the amount of sales, any value of stamps upon written instruments or articles of merchandise. The only limitation is, that the rule of uniformity must prevail throughout the United States. This rule does not require that all trades, businesses, merchandise, written instruments, and the like, shall be taxed alike, or even taxed at all. It means that when an impost is placed upon one article, the same burden shall be borne by that subject in all parts of the country. Congress may discriminate between articles in all the several species of indirect taxes. The discrimination may be unfair and impolitic, but it is not illegal.”*

Pollock vs. Farmers' Loan and Trust Co., 157 U. S., 592,
Mr. Justice Field writes :

“The uniformity thus required is the uniformity throughout the United States of the duty, impost, and excise levied. That is, the tax levied cannot be one sum upon an article at one place and a different sum upon the same article at an-

“other place. The duty received must be the same at all
 “places throughout the United States, *proportioned to the*
 “*quantity of the article disposed of or the extent of the business*
 “*done.* If, for instance, one kind of wine or grain or produce
 “has a certain duty laid upon it *proportioned to its quantity* in
 “New York, it must have a like duty *proportioned to its*
 “*quantity* when imported at Charleston or San Francisco, or
 “if a tax be laid upon a certain kind of business *proportioned*
 “*to its extent* at one place, it must be a like tax on the same
 “kind of business *proportioned to its extent* at another place.
 “In that sense the duty must be uniform throughout the Uni-
 “ted States.

“It is contended by the government that the Constitution
 “only requires an uniformity geographical in its character.
 “that position would be satisfied if the same duty were laid in
 “all the states, however variant it might be in different places
 “of the same state. But it could not be sustained in the lat-
 “ter case without defeating the equality which is an essential
 “element of the uniformity required, so far as the same is
 “practicable.

“In *United States vs. Singer*, 82 U. S. (15 Wall.) 111, 121,
 “a tax was imposed upon a distiller, in the nature of an excise
 “and the question arose whether in its imposition upon differ-
 “ent distillers the uniformity of the tax was preserved, and
 “the court said: ‘The law is not in our judgment subject to
 “‘any constitutional objection. The tax imposed upon the dis-
 “‘tiller is in the nature of an excise, and the only limitation
 “‘upon the power of Congress in the imposition of taxes of
 “‘this character is that they shall be uniform throughout the
 “‘United States. The tax here is uniform in its operation ;
 “‘that is, it is assessed *equally upon all manufacturers of spirits*
 “‘*wherever they are.* The law does not establish one rule for
 “‘one distiller and a different rule for another, but the same
 “‘rule for all alike.’

“In the *Head Money* cases 112 U. S. 580, 594, a tax was
 “imposed upon the owners of steam vessels for each passenger
 “landed at New York from a foreign port, and it was objected
 “that the tax was not levied by any rule of uniformity, but
 “the court by Justice Miller, replied: ‘The tax is uniform
 “‘when it operates with the same force and effect in *every*
 “‘place where the subject of it is found. The tax in this case,

“ ‘which, as far as it can be called a tax, is an excise duty on
 “ ‘the business of bringing passengers from foreign countries
 “ ‘into this, by ocean navigation, is uniform and operates pre-
 “ ‘cisely alike in every port of the United States where such
 “ ‘passengers can be landed.’ In the decision in that
 “ ‘case, in the circuit court (18 Fed. Rep. 135, 139)
 “ ‘Mr. Justice Blatchford, in addition to pointing out that ‘the
 “ ‘Act was not passed in the exercise of the power of laying
 “ ‘taxes,’ but was a regulation of commerce, used the following
 “ ‘language : ‘Aside from this, the tax applies uniformly to all
 “ ‘steam and sail vessels coming to all ports in the United
 “ ‘States, from all foreign ports, with all alien passengers. The
 “ ‘tax being a license tax on the business, *the rule of uniform-
 “ ‘ity is sufficiently observed if the tax extends to all persons of
 “ ‘the class selected by Congress : that is, to all owners of such
 “ ‘vessels.* Congress has the exclusive power of selecting the
 “ ‘class. It has regulated that particular branch of commerce
 “ ‘which concerns the bringing of alien passengers,’ and that
 “ ‘taxes shall be levied upon such property as shall be pre-
 “ ‘scribed by law. The object of this provision was to prevent
 “ ‘unjust discriminations. It prevents property from being
 “ ‘classified and taxed as classed, by different rules. *All kinds
 “ ‘of property must be taxed uniformly, or be entirely exempt.*
 “ ‘The uniformity must be coextensive with the territory to
 “ ‘which the tax applies.

“ ‘Mr. Justice Miller, in his lectures on the Constitution
 “ ‘(N. Y., 1891), pp. 240, 241, said of taxes levied by Congress :
 “ ‘The tax must be uniform on the *particular article* ; and it is
 “ ‘uniform, within the meaning of the constitutional require-
 “ ‘ment, if it is made to bear the *same percentage* over all the
 “ ‘United States. That is manifestly the meaning of this
 “ ‘word as used in this clause. The framers of the Constitu-
 “ ‘tion could not have meant to say that the government, in
 “ ‘raising its revenues, should not be allowed to discriminate
 “ ‘between the *articles which* it should tax.’ In discussing gen-
 “ ‘erally the requirement of uniformity found in state constitu-
 “ ‘tions, he said : ‘The difficulties in the way of this construc-
 “ ‘tion have, however, been very largely obviated by the mean-
 “ ‘ing of the word “uniform,” which has been adopted, holding
 “ ‘that the uniformity *must refer to articles of the same class.*
 “ ‘That is, different articles may be taxed at different amounts

“*provided the rate is uniform on the same class everywhere,*
 “*with all people, and at all times.*”

“One of the learned counsel puts it very clearly when he
 “says that the correct meaning of the provisions requiring
 “duties, imposts, and excises to be ‘uniform throughout the
 “‘United States’ is, that the law imposing them should ‘have
 “‘an equal *and* uniform application in every part of the
 “‘Union.’”

Mr. Justice Brown, 158 U. S. Rep., 693, writes :

“Irrespective, however, of the Constitution, a tax which is
 “wanting in uniformity among members of the same class is,
 “or may be invalid. But this does not deprive the legislature
 “of the power to make exemptions.”

In the former income tax case, *Pacific Ins. Co. vs Soule*, 74
 U. S. (7 Wall), 433, Mr. Justice Swayne at p. 466, discussing the
 taxing power of Congress, writes :

“The taxing power is given in the most comprehensive
 “terms. The only limitations imposed are : that *direct taxes*,
 “including the capitation tax, shall be *apportioned* ; that du-
 “ties, imposts, and excises shall be *uniform*; and that no du-
 “ties shall be imposed upon articles exported from any state.
 “With these exceptions, the exercise of the power is, in all
 “respects unfettered.”

It will be observed that there is here no suggestion of the so-
 called *geographical* uniformity, but only that “duties, imposts and
 excises shall be uniform” in all places :

Story on the Constitution, Sec. 999, quoting Chief Justice Mar-
 shall in *Loughborough vs. Blake*, 5 Wheat., 318, 319 :

“The power, then, to lay and collect duties, imposts and ex-
 “cises may be exercised *and must be exercised throughout the*
 “*United States*. Does this term designate the whole, or any
 “particular portion of the American empire? Certainly this
 “question can admit of but one answer. It is the name given
 “to our great Republic, which is composed of States and Terri-
 “tories. The District of Columbia, or the territory west of
 “the Missouri, is not less within the United States than
 “Maryland or Pennsylvania ; and it is not less necessary, on
 “the principles of our Constitution, that uniformity in the

“imposition of imposts, duties, and excises should be observed in the one than in the other.”

The word “uniform,” as used in State Constitutions and as construed by the State Courts is interchangeable with “equal.”

Johnston vs. Macon, 62 Ga., 645, 651,
 Bureau Co. vs. Chicago, etc. R. R., 44 Ill., 229.
 Chicago & N. W. R'y Co. vs. Boone Co., 44 Ill., 240.
 Prim vs. Belleville, 59 Ill., 142.
 Gunnison Co. vs. Owen, 7 Col., 467.
 Gilman vs. Sheboygan, 54 U. S. (2 Black), 510.
 Glasgow vs. Rowse, 43 Mo., 479, at p. 489, Wagner, J.

“In reference to taxation, the Constitution is not so much to be regarded a grant of power as a restriction or limitation of power. *That taxes should be uniform, and levied in proportion to the value of the property to be taxed*, is so manifestly just that it commends itself to universal assent.”

State vs. Hannibal, etc., R. R. Co., 75 Mo., 208, Sherwood, C. J., at p. 211.

“Besides, the idea of taxation imports the equality of apportionment and assessment upon all property. Cooley Constitutional Lim., p. 2, and cases cited. It is this which distinguishes taxation from arbitrary exaction. 2 Dillon Mun. Corp'n, Sec. 736.”

U. S. vs. Riley, 5 Blatch., 204, Shipman, J., at p. 209.

“Tax Laws, both State and National, are required to be uniform. This is an elementary principle of legislation, resting upon the solid foundation of justice.”

It has been frequently asserted that the uniformity contemplated by the framers of the Constitution was merely geographical, as between the different States of the Union.

In Edye vs. Robertson, 112 U. S., 580, at page 594, Mr. Justice Miller writes:

“The uniformity here prescribed has reference to the various localities in which the tax is intended to operate. ‘It shall be uniform throughout the United States.’ Is the tax on tobacco void because in many of the States no tobacco

“ is raised or manufactured ? Is the tax on distilled spirits
 “ void, because a few States pay three-fourths of the revenue
 “ arising from it ? ”

To the same effect, Lectures on the Constitution (N. Y., 1891), at page 239. Exactly what Mr. Justice Miller means by this language is made clear in the passage immediately following.

At page 240 :

“ They are not required to be uniform as between the different articles that are taxed, but uniform as between the different places and different states. • • • *The tax must be uniform on the particular article ; and it is uniform within the meaning of the constitutional requirement if it is made to bear the same percentage over all the United States.* ”

At page 241, referring to similar provisions, which have been adopted in some of the State Constitutions, he says that the practical construction, which has been given these provisions of the State Constitution, is to allow classification of different articles for purposes of taxation, and that the provision of the State Constitutions is satisfied, “ provided the *rate* is uniform on the same class everywhere with all people and at all times.” But this is, in effect, the construction which he has given to the like provision of the United States Constitution.

The power of classification for purposes of taxation, either in Congress or in the State Legislatures, is not questioned, but we respectfully insist, independently of and without reference to the provisions, either of State or United States Constitutions, that, whenever a reasonable and proper classification has been made, the *rate* of tax upon the property of persons included within that class must be equal and uniform, proportioned to the amount of property taxed.

It is clear that Mr. Justice Miller in the passages above quoted had in contemplation a fixed and equal *rate* of tax upon the same class of taxable objects proportioned to the number or quantity of such taxable objects. The *rate* being the same for the same class *in every part of the United States*, the statutes imposing the taxes were not obnoxious to the constitutional objection that the taxes imposed lacked uniformity.

The language employed by Mr. Justice Miller does not warrant the conclusion that a tax inherently and essentially unequal in its

operation, does not violate the constitutional requirement in question, provided the same inequalities be maintained in all of the States of the United States. Such contention has no support either in reason or authority.

The tax is only "uniform" when it operates with the "*same force and effect*" in every place where the subject is found."

The United States government, within the limitations of its constitutional powers is a unit, one general government, exactly as the respective State governments are units in respect of the powers reserved to themselves, and when the United States Constitution provides that a tax shall be uniform "throughout the United States," it is difficult to understand why the words should receive a different interpretation in relation to the territory constituting the United States, than the words "throughout the State," as used in State Constitutions, receive in the interpretation of State Constitutions, in relation to the territory constituting the respective States.

Why may it not be argued with equal reason that a provision in a State Constitution that a tax shall be "uniform" throughout the State simply relates to the geographical divisions of the State into counties and townships, and that the uniformity exacted by the State Constitution only requires that taxes shall be uniform as between counties or townships, and that any lack of uniformity in the imposition of a tax in any one county or township would be entirely proper, provided the same inequality were maintained throughout all other counties or townships of the State.

Chief Justice Bartley in *Exchange Bank of Columbus vs. Hines*, 3 Ohio St., 1, at page 15, defines "uniform" thus :

" '*taxing*' is required to be 'by a uniform rule,' that is, by 'one and the same unvarying standard. Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode* of the assessment upon the taxable valuation. *Uniformity in taxing implies equality in the burden of taxation*; and this equality of burden cannot exist without uniformity in the mode of the assessment as well as in the rate of taxation."

b. *Irrespective and independently of the provision of the Constitution, all taxes must be as nearly uniform or equal as may be on the same class of property.*

While, as has been stated by this Court, perfect and absolute equality is a "baseless dream," still the fact that absolute equality in the imposition of taxes can never be attained, does not excuse either Congress or the State Legislatures from approximating, as nearly as may be, to the inherent and fundamental principle of equality in all taxation, and no law, whether of the general government or of the State governments which fails to tax the same class of property at the same *rate* will stand. This rule is well stated by Mr. Attorney General Olney in the Income Tax cases :

" So far as the validity of this Income Tax Law or any other tax law is concerned, the word 'uniform' might as well be out of the Constitution as in it. The word is surplusage. It simply designates and describes an essential element of every tax—an element which is inherent in every valid tax, and the absence of which would be sufficient to annul attempted exercise of the taxing power." * * *

" Theoretically a tax for the benefit of the public should fall equally upon all persons composing the public ; should, as text-writers and judges often express it, *be ratable and proportional*, and be so adjusted that every member of the community shall contribute his just and equal share toward the common defense and the general welfare." * * *

" Hence, in taxing this class or exempting that, Congress must proceed upon considerations of public policy, and cannot adopt a classification which has no relation to the end to be attained, and is founded only in whim or caprice."

Cooley's Constitutional Limitations, 6th Edition, page 598 :

" Everything that may be done under the name of taxation is not necessarily a tax ; and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."

Page 607 :

" *It is of the very essence of taxation that it be levied with equality and uniformity*, and to this end, that there should be some system of apportionment. Where the burden is common there should be common contribution to discharge it. Taxation is the equivalent for the protection which the

“government affords to the personal property of its citizens; and as all alike are protected, so all alike should bear the burden in proportion to the interests secured. Taxes by the poll are justly regarded as odious and are seldom resorted to for the collection of revenue; *and when taxes are levied upon property, there must be a proviso with reference to a uniform standard, or they degenerate into a mere arbitrary exaction.* In this particular the State Constitutions have been very specific, *though in providing for equality and uniformity they have done little more than to state in concise language a principle of constitutional law which, whether declared or not, would inhere in the power to tax.*”

It has been held by this Court that a classification for purposes of taxation is proper which constitutes railroad corporations a separate class (Kentucky Railroad Tax Cases, 115 U. S., 321.) This authority does not, however, justify a gross discrimination between members of the same class of natural persons or corporations by varying the *rate* of the tax against different members of the same class, according to the *amount* of taxable property held by them, increasing the *rate* with the increase in *amount* of taxable property

This is exactly what is attempted to be accomplished by the act of Congress in question.

This mode of classification was condemned by Mr. Justice Harlan in his dissenting opinion in the Income Tax Case, in the following language, 158 U. S., at page 674:

“If it were true that this legislation, in its important aspects, and in its essence, *discriminated against the rich because of their wealth*, the Court, in vindication of the equality of all before the law, might well declare that the statute was not an exercise of the power of *taxation*, but was repugnant to those principles of natural right upon which our free institutions rest, and, therefore, was legislative spoliation, under the guise of taxation.”

Increasing the *rate* of taxation with the increase of the *amount* of property taxed, is in no wise different from valuing the property of different members of the same taxable class for purposes of taxation upon a different basis.

It is true that it is entirely competent for Congress to classify imported articles, both in respect of differences in the *kind* of

articles imported, and in respect of differences in value and quality of like articles, as in *Arthur's Executors vs. Vietor*, 127 U. S., 572; *Hedden vs. Robertson*, 151 U. S., 520; *Arthur vs. Morgan*, 112 U. S., 495-8.

But, on the other hand, is it within the constitutional power of Congress to classify the same articles of import, of equal value and quality, and establish a *rate* of duty according to the *quantity* of such article which may be imported?

c. *The provisions of the XIVth amendment to the Constitution of the United States that "no State shall deny to any person within its jurisdiction the equal protection of the laws" has been frequently invoked in this Court by persons complaining that they have been denied equal rights with other members of the State community in respect to taxation.*

In most of these cases the relief sought has been denied by this Court.

Many of them are cited and discussed in the opinion of Mr. Justice McKenna in

Magoun vs. Ill. Trust and Savings Bank, 170 U. S., 283.

The reason usually assigned by the Court for its determination has been that the classification for purposes of taxation established by the State statutes under discussion, "is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and it is not a mere arbitrary selection."

Gulf, Col. & Santa Fe Ry. Co. vs. Ellis, 165 U. S., 150.
or, that there has been no "unjust discrimination against any person or corporation" as in

Bells Gap R. R. Co. vs. Pennsylvania, 134 U. S., 232.
at the same time holding (p. 237) that "*clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition.*"

In *Giazza vs. Tiernan*, 148 U. S., 657,
the validity of a State statute of Texas was drawn in question. Plaintiff in error was indicted upon the charge of having pursued

the occupation of selling spirituous liquors in quantities less than one quart without first having obtained a license therefor. He was tried, convicted and fined \$450. It was contended in his behalf that the statute was in violation of the XIVth Amendment of the Constitution. At page 662 Mr. Chief Justice Fuller writes:

"Nor in respect of taxation was the amendment intended
 "to compel the State to adopt an iron rule of equality; to
 "prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, especially either in the extent to which it operates, or the objects sought to be obtained by it. *It is enough that there is no discrimination in favor of one as against another of the same class,*" citing Bells Gap case.

" * * * This statute affects all persons in Texas engaged in the sale of liquors *in exactly the same manner and degree.*"

There is another class of cases in which relief has been denied to corporations from alleged unequal taxation, upon the ground that, corporations being the creatures of State statutes, and having the right to exist only by permission of the States under whose laws they were organized, it was entirely competent for the States to impose such terms as a condition of their existence *at all* as to the State Legislatures might seem proper. As in

Home Ins. Co. vs. People, 134 U. S., 594.

In that case the constitutionality of the New York franchise tax was before the Court. It was contended that the tax violated the provision of the constitution in question, in that the tax assessed was unequal because being assessed upon dividends, the *rate* of tax was unequal whenever dividends amounted to less than six per cent. All dividends in excess of six (6) per cent. were taxed at the same rate, namely: $\frac{1}{4}$ mill per cent. upon the capital stock for each one per cent. of the dividends. Where the dividends were less than six (6) per cent. the amount of capital stock was made the basis of the franchise tax and not the dividends. It was held, Mr. Justice Field, writing for the Court, that the term "corporate franchise or business," as used in the act, meant the right or privilege given by the State to two or more persons to be a corporation and do business.

At page 600

“ The granting of such right or privilege rests entirely in
 “ the discretion of the State and of course, when granted, may
 “ be accompanied with such conditions as its Legislature may
 “ judge most befitting to its interests and policy. * * * No
 “ constitutional objection lies in the way of a legislative body
 “ prescribing any mode of measurement to determine the
 “ amount, it will charge for the privileges it bestows.
 “ (p. 606). Nor is the objection tenable that the statute, in
 “ imposing such tax, conflicts with the last clause of the first
 “ section of the XIVth Amendment of the Constitution of
 “ the United States. * * * The amendment does not pre-
 “ vent the classification of property for taxation—subjecting
 “ one kind of property to one rate of taxation and another
 “ kind of property to a different rate—distinguishing between
 “ franchises, licenses and privileges, and visible and tangible
 “ property, and between real and personal property. Nor does
 “ the amendment prohibit special legislation. * * * and
 “ when such legislation applies to artificial bodies, *it is not*
 “ *open to objection if all such bodies are treated alike under*
 “ *similar circumstances and conditions*, in respect to the pri-
 “ vileges conferred upon them and the liabilities to which they
 “ are subjected.”

There is still another class of cases relating to the subject of
 state taxes on inheritances.

Major vs. Grima, 49 U. S. (8 How.), 490.

Frederickson vs. Louisiana, 64 U. S. (23 How.), 445.

Magoun vs. Ill. Trust and Savings Bank, 170 U. S.,
 283.

United States vs. Perkins, 163 U. S., 625.

In Major vs. Grima (49 U. S. 8 How., 490), the question arose as
 to the constitutionality of the law of the State of Louisiana, under
 which every person not being domiciliated in that state and not
 being a citizen of any state or territory in the Union, who
 shall be entitled, whether as heir, legatee or donee to the whole or
 any part of the succession of any person deceased, shall pay a tax
 of ten per cent. of the value thereof. Mr. Chief Justice Taney at
 pp. 493-4 writes :

“ Now the law in question is nothing more than an exercise
 “ of the power which every state and sovereignty possesses, of
 “ regulating the manner and terms upon which property, real
 “ or personal, within its dominion may be transmitted by last
 “ will and testament or by inheritance and of prescribing who
 “ shall and who shall not be capable of taking it. Every state
 “ or nation may unquestionably refuse to allow an alien to
 “ take either real or personal property situated within its
 “ limits, either as heir or legatee, and may, if it thinks proper,
 “ direct that property so descending or bequeathed shall belong
 “ to the state. In many of the states of the Union at this day
 “ real property devised to an alien is liable to escheat. And
 “ if a state may deny the privilege altogether it follows that,
 “ when it grants it, it may annex to the grant any conditions
 “ which it supposes to be required by its interests or policy.
 “ This has been done by Louisiana. The right to take is
 “ given to the alien subject to a deduction of ten per cent. for
 “ the use of the State.

“ In some of the States, laws have been passed at different
 “ times imposing a tax similar to the one now in question upon
 “ its own citizens as well as foreigners; and the constitution-
 “ ality of these laws has never been questioned. And if a
 “ State may impose it upon its own citizens, it will hardly be
 “ contended that aliens are entitled to exemption, and that
 “ their property in our own country is not liable to the same
 “ burdens that may lawfully be imposed upon that of our
 “ citizens.”

So, in *Frederickson vs. State of Louisiana*, 64 U. S. (23 How.), 445,
 the same statute came up for construction before this Court. It
 was contended that the provisions of the statute were in violation
 of the terms of the Convention between the United States and the
 King of Wurtemberg. The decision of the question at issue in
 that case rested upon the fact that the treaty did not go into effect
 until after the right of inheritance had become vested.

Mr. Justice Campbell, in his opinion, writes (p. 447):

“ This Court, in *Major vs. Grima*, 8 How., S. C. R., 490, de-
 “ cided that the act of the Legislature of Louisiana was noth-
 “ ing more than the exercise of the power which every State
 “ or sovereignty possesses, of regulating the manner and terms

“ upon which property, real and personal, within its dominion
 “ may be transmitted by last will and testament, or by inherit-
 “ ance, and of prescribing who shall and who shall not be
 “ capable of taking it.”

In *Magoun vs. Illinois Trust & Savings Bank*, 170 U. S., 283, the construction of the Inheritance Tax of the state of Illinois came before the court. By the Illinois act a tax was imposed upon the right to inherit from a deceased person. The act exempted, to the amount of \$20,000, legacies and distributive shares of widows, husbands, fathers, mothers, descendants, brothers, sisters, children-in-law and adopted children, and taxed the excess over \$20,000 passing to members of these classes at \$1 per \$100.

Legacies and distributive shares passing to uncles, aunts, nieces, nephews and their descendants exempted \$2,000 and taxed the excess at \$2 per \$100. In all other cases a tax on all legacies and distributive shares of \$10,000 and less was assessed at \$3 per \$100; on all over \$10,000, not exceeding \$20,000, \$4 per \$100; on all over \$20,000 and not exceeding \$50,000, \$5 per \$100, and on all over \$50,000, \$6 per \$100. Legacies and distributive shares of less than \$500 were exempted.

It was contended that the tax provisions of this law were in violation of the provisions of the clause of the XIVth Amendment of the United States Constitution prohibiting a state denying to any citizen the equal protection of the laws. The opinion of the majority of this court was written by Mr. Justice McKenna. Its determination was, that the law of the State of Illinois did not violate the provision of the United States Constitution referred to. It was stated in the prevailing opinion that the right to dispose of property by will or to inherit property of persons dying intestate was an affirmative right granted by the state and that it was entirely competent for the State to restrict the right of inheritance in such manner or to impose such conditions thereon as the State Legislature deemed proper. In this view of the exclusive power of States to regulate and determine the right of inheritance, either in cases of intestacy or under a will, it was held that no obligation was cast by the United States Constitution upon State Legislatures to impose a tax upon the right of inheritance, which should be absolutely equal and uniform in all cases, and that it was proper for State Legislatures to create classes for the purposes of a *State succession tax*, based upon the amounts of legacies or inheritances received.

In none of the State Statutes considered in the above cited cases, except in the Magoun case, is found the one objectionable feature, which exists in the United States enactment now before the Court, a provision which arbitrarily varies the *rate* of taxation of the *same kinds and classes of property and against the members of the same class of taxable persons*, on account of the *amount* of such property which it is sought to tax. The clear inference to be drawn from the opinions in the cases cited is, that a State statute, imposing any ordinary tax upon property, which should seek to discriminate against large holders of the same kind of taxable property and to assess them *at a higher rate*, solely on account of their increased holdings, would be objectionable under the XIVth Amendment of the Constitution. The *classification of property* for taxation, which subjects *one kind of property* to one rate and *another kind of property* to a different rate is not objectionable, but suppose a State statute, imposing a tax other than an inheritance or franchise tax, undertook to subject the *same kind of property* in the hands of *the same class of taxable persons* to different *rates* of taxation, would not such a State statute be unconstitutional and in violation of the provision of the XIVth Amendment?

As stated in the dissenting opinion of Mr. Justice Brewer, in the Magoun case (p. 302):

"It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained, but being a tax upon succession, it is held that a different rule prevails. The argument is that because the State may regulate inheritances, and the extent of testamentary disposition, it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses."

It will hardly be contended that Congress has any power whatsoever in the matter of the regulation of the succession of individuals to the property of deceased persons. That power rests exclusively with the States, and whatever their policy in this regard may be, it must be accepted by the United States Government for all purposes. The United States Government may not impose any conditions or limitations whatsoever upon the right of individuals to succeed to the property of deceased persons. While it may be competent for the State to impose taxes lacking equality

and uniformity, upon legacies and distributive shares, as a condition to the succession, it is not within the constitutional power of the United States to exact any such condition.

The right of individuals to inherit, as determined by the respective state legislatures, must be accepted by the General government as a fixed and accomplished fact outside of and beyond its power to influence or control by legislation, and so far as it is concerned, the rights of individuals under State statutes to inherit is as absolute and fixed a property right as was the right of their respective decedents to hold and own their property during their lives.

Therefore, the theory that the United States are taxing, not the property which passes to the respective next of kin or legatees, but the right to succeed to the property is absolutely erroneous, and the reasons stated by Mr. Justice McKenna for the conclusion reached by the Court in the *Magoun* case have absolutely no bearing upon or relation to the question now before the Court.

The general government is without constitutional power to impose its tax as a *condition* of inheritance. It taxes the property inherited, not the right to succeed to the property. In either case the tax must be "uniform throughout the United States."

What is the classification sought to be established by the Act of Congress in question for purposes of taxation? Under one interpretation of the act, the amount of the personal estate of the decedent. Under another possible interpretation, the amounts of the respective legacies or distributive shares.

Under either construction it is a tax, the *rate* of which depends upon the *amount* of property taxed.

In its final analysis, this Court, to sustain this act of Congress, must decide that this is a proper classification for purposes of taxation, and that the *rate* of tax may vary with the *amount* of taxable property in the hands of the same class of taxable persons.

d. *Scholey, vs. Rew*, 90 U. S. Supreme Court, Reports, 23 Wall, 331,

construed the former succession tax of 1864. As the provisions of that act materially differ from those of the act now under consideration, Scholey vs. Rew is not an authority in point.

It was provided by the act of 1864 that there should be paid to the United States in respect of every legacy or distributive share arising from personal property, a duty or tax of one per cent.,

where the persons entitled were the lineal issue, lineal ancestors, brother or sister of the deceased person; at the rate of two per cent. where such persons were descendants of a brother or sister of the deceased person; at the rate of four per cent. where such persons were a brother or sister of the father or mother or the descendant of a brother of the father or mother of the deceased person, and at the rate of five per cent. where such persons were a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother of the deceased person, and at the rate of six per cent. where such persons were in any other degree of collateral consanguinity or a stranger in blood or a corporation. The act entirely exempted legacies and distributive shares passing to a husband or wife of the deceased person, and also exempted those passing to a minor child where the legacy or distributive share was less than \$1,000, and in the latter case, the excess over \$1,000 was taxable.

It will be observed that the classifications here established were based upon the degree of relationship or the fact of the non-existence of any relationship whatsoever, and no attempt was made to create classes based upon the *amounts* received, or the *amounts* of the estates from which the legacies or distributive shares were paid, as is attempted in the present act.

No contention was made in the *Rew* case that the provisions of the act of 1864 were subject to the objection that the tax lacked uniformity and equality. The only question considered by the Court was whether or not the tax was a direct tax.

e. Even if the uniformity specified in the clause of the Constitution in question be held to be a mere geographical uniformity, nevertheless the tax in question constitutes a violation of that rule of uniformity.

A tax to be uniform geographically, as between the States, must be an equal tax in each of the different States upon the same kind of taxable property of the same class of taxable persons, that is to say, the *rate* of tax must be *proportional* to the *amount* of property taxed in every State. If this be a correct definition of geographical uniformity, the tax in question is not even geographically uniform. Let us assume, for example, that every person who has died in New York State since this act went into effect, was possessed of personal property of the value of upwards of one million dollars, and that every person who has died in the State of West Virginia was possessed of personal property of the value of more

than ten thousand dollars, and less than twenty-five thousand dollars, and that, in both instances, the entire property passed to children of the deceased person. We thus have in New York State a *rate* of tax upon property passing to children of $2\frac{1}{4}$ per cent., and in West Virginia a *rate* of tax upon property passing to the same class, children, of three-quarters of one per cent. So in New York State, the *rate* of tax upon property passing to persons bearing no relation to the deceased person or to corporations would be fifteen per cent., while in West Virginia it would be five per cent. regardless of the amount of the legacies passing to such individuals or corporations.

While the above assumption is undoubtedly unwarranted by the facts, it is, nevertheless, approximately correct. Certainly, the number of estates in New York, of which the personal property exceeds in value \$25,000, greatly exceeds the number of such estates in West Virginia, and, to that extent, the *rate* of taxation of legatees and distributees in New York exceeds the *rate* of taxation of the same class of legatees and distributees in West Virginia.

f. No act of Congress has ever before attempted to create classes for purposes of taxation, based upon the amounts of taxable property held or received, with varying rates of taxation, the rate increasing as the amount increases.

Such an attempt constitutes "in its essence" a discrimination "against the rich because of their wealth," and this Court should "in vindication of the equality of all before the law * * * declare that the statute was not an exercise "of the power of *taxation*, but was repugnant to those principles of natural right upon which our free institutions rest, "and, therefore, was legislative spoliation, under the guise of "taxation." Mr. Justice Harlan, *Income Tax Case*, 158 U. S., 674.

g. Analysis of Section 29 of the War Revenue Law and application of the foregoing principles to its provisions.

The Section provides that "any * * * persons having "in charge * * * as * * * Executors * * * any "legacies * * * arising from personal property, where "the whole amount of such personal property as aforesaid "shall exceed the sum of ten thousand dollars in actual value,

“ passing * * * from any person possessed of such prop-
 “ erty * * * by will * * * to any person or persons, or
 “ to any body or bodies, politic or corporate, * * * shall
 “ be, and hereby are, made subject to a duty or tax * * * as
 “ follows—that is to say: Where the whole amount of said per-
 “ sonal property shall exceed in value ten thousand and shall
 “ not exceed in value the sum of twenty-five thousand dollars,
 “ the tax shall be”

First—Where the persons entitled shall be the lineal issue or lineal ancestors, brother or sister to the deceased person, 75 cents for each one hundred dollars of the clear value of such interest.

Second—Where the persons entitled shall be the descendant of a brother or sister of the decedent, at the rate of \$1.50 for each one hundred dollars.

Third—Where the persons entitled shall be a brother or sister of the father or mother or a descendant of a brother or sister of the father or mother of the decedent at the rate of \$3 for each one hundred dollars.

Fourth—Where the persons entitled shall be a brother or sister of the grandfather or grandmother of the decedent, or descendants, etc., at the rate of \$4 for each one hundred dollars.

Fifth—Where the persons entitled shall be in any other degree of relationship or a stranger in blood to the decedent, or a corporation, at the rate of \$5 for each one hundred dollars.

“ Provided, that all legacies or property passing by will or by the laws of any State or Territory to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

“ Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.”

It has been held by the Commissioner of Internal Revenue that the words "said property" in the clause of Section 29, which provides for the increase of the *rate* of tax, with the increase of the "amount or value of *said property*," refer to the whole amount of personal property of the decedent passing to legatees and distributees, and not to the amounts of the respective legacies and distributive shares. This is probably the correct interpretation of the language employed.

For the purposes of this discussion it is immaterial, which view is adopted.

First—As to the lineal issue, lineal ancestors, brothers and sisters. The inheritance of each is taxed thus.

If the "said property" is valued at more than \$10,000 and not more than \$25,000, the *rate* of tax is $\frac{3}{4}$ per cent.

If more than \$25,000 and no. more than \$100,000, the *rate* of tax is $1\frac{1}{8}$ per cent.

If more than \$100,000 and not more than \$500,000, the *rate* of tax is $1\frac{1}{2}$ per cent.

If more than \$500,000 and not more than \$1,000,000, the *rate* of tax is $1\frac{3}{8}$ per cent.

If more than \$1,000,000, the *rate* of tax is $2\frac{1}{4}$ per cent.

Second—As to collaterals, non-relatives and corporations, mentioned in the "Fifth" subdivision, the respective *rates* of tax, according to *amounts*, are: 5 per cent., $7\frac{1}{2}$ per cent., 10 per cent., $12\frac{1}{2}$ per cent., 15 per cent.

Testator "A" dies possessed of personal property of the net value of \$12,000 and bequeaths it in equal shares to four children, each of whom receives \$3,000, for which he is taxed $\frac{3}{4}$ per cent.

Testator "B" leaves personal property of the net value of \$9,000 and bequeaths it to one child, who receives \$9,000, but is not taxed.

Testator "C" leaves \$27,000 equally to three children, \$9,000 each. Tax, $1\frac{1}{8}$ per cent.

Testator "D" leaves \$1,100,000 and bequeaths to one child \$9,000. Tax, $2\frac{1}{4}$ per cent.

Testator "E" leaves \$9,000, bequeaths to his church \$5,000. No tax.

Testator "F" leaves \$15,000, bequeaths to his church \$5,000. Tax 5 per cent., \$250.

Testator "G" leaves \$2,000,000, bequeaths to his church \$5,000. Tax 15 per cent., \$750 (as in the case at bar).

Testator "H" leaves personal property, \$9,000; real property, \$2,000,000, bequeaths to his church, \$9,000. No tax.

Testator "J" leaves \$2,000,000, bequeaths to his brother \$100,000. Tax $2\frac{1}{4}$ per cent., \$2,250 (as in the case at bar).

Testator "K" leaves \$400,000, bequeaths to his brother \$100,000. Tax $1\frac{1}{2}$ per cent., \$1,500.

Thus, under the construction of the statute adopted by the Commissioner of Internal Revenue, we have an attempted classification, based neither upon degree of relationship, nor amounts received, but upon *the source from which the property taxed is derived*.

This would seem to be "a classification which has no relation to the end to be attained, and * * * founded only in whim or caprice."

Argument of Attorney General Olney in Income Tax Cases.

But assume, for purposes of argument, that Congress by the words "said property" intended to designate the amounts of the respective legacies or distributive shares passing from the decedents.

The classification then becomes: (1) Children, etc., (2) nephews and nieces, etc., (3) uncles and aunts, etc., (4) great uncles and aunts, etc., (5) other collaterals, etc.

Such a classification would be entirely proper, if the law were not otherwise unconstitutional, and if the classification ended here.

But each of the above classes is again sub-classified according to the *amounts* received, and a *rate* of tax imposed against each member of the sub-class, according to the *amount* received by him. The *rate* of tax increases as the *amount* of the legacy or distributive share increases.

For example:

A child receives a legacy of \$9,000 and is not taxed.

He receives a legacy of \$11,000 and is taxed $\frac{3}{4}$ per cent.

He receives a legacy of \$26,000 and is taxed $1\frac{1}{8}$ per cent.

He receives a legacy of \$101,000 and is taxed $1\frac{1}{2}$ per cent.

He receives a legacy of \$501,000 and is taxed $1\frac{3}{8}$ per cent.

He receives a legacy of \$1,700,000 and is taxed $2\frac{1}{2}$ per cent. (as in the case at bar).

In other words the law makes a clear discrimination against the rich, and exacts from them a greater *proportional* contribution to the needs of the government.

There is not a case which I have been able to find in the books which has not unqualifiedly condemned such a discrimination as constituting legislative spoliation and confiscation, and not taxation.

The cases above considered, in which State legislatures have imposed unequal taxation as a condition to the enjoyment of a right or privilege affirmatively granted by it, as in the case of State taxes upon successions and franchises, have no bearing upon the question now before the Court.

In those cases the State statutes were sustained, not as constituting a proper exercise of the taxing power, but as a lawful imposition of a condition to the enjoyment of a right or privilege conferred, which rested within the exclusive power of the State to grant.

The general government possesses no such power in respect of successions to the property of deceased persons. It is powerless to exact the payments specified as a condition to the enjoyment of the right of succession, as the exclusive control of this subject, rests with the respective State governments.

Therefore, the Act of Congress in question can only be considered as an Act for the imposition of taxes, which, if indirect, as we have assumed for the purposes of this argument, must be "uniform throughout the United States." We most respectfully submit that an indirect tax, which clearly discriminates against the holders of large amounts of property and taxes them at a higher *rate* than the holders of smaller amounts, is not a uniform tax within the intention of the framers of the United States Constitution, nor an equal tax within the inherent and fundamental principles of all taxation, as distinguished from arbitrary confiscation.

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Brief of Peckham for P. E.

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JAMES H. KENNEY

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United States Supreme Court.

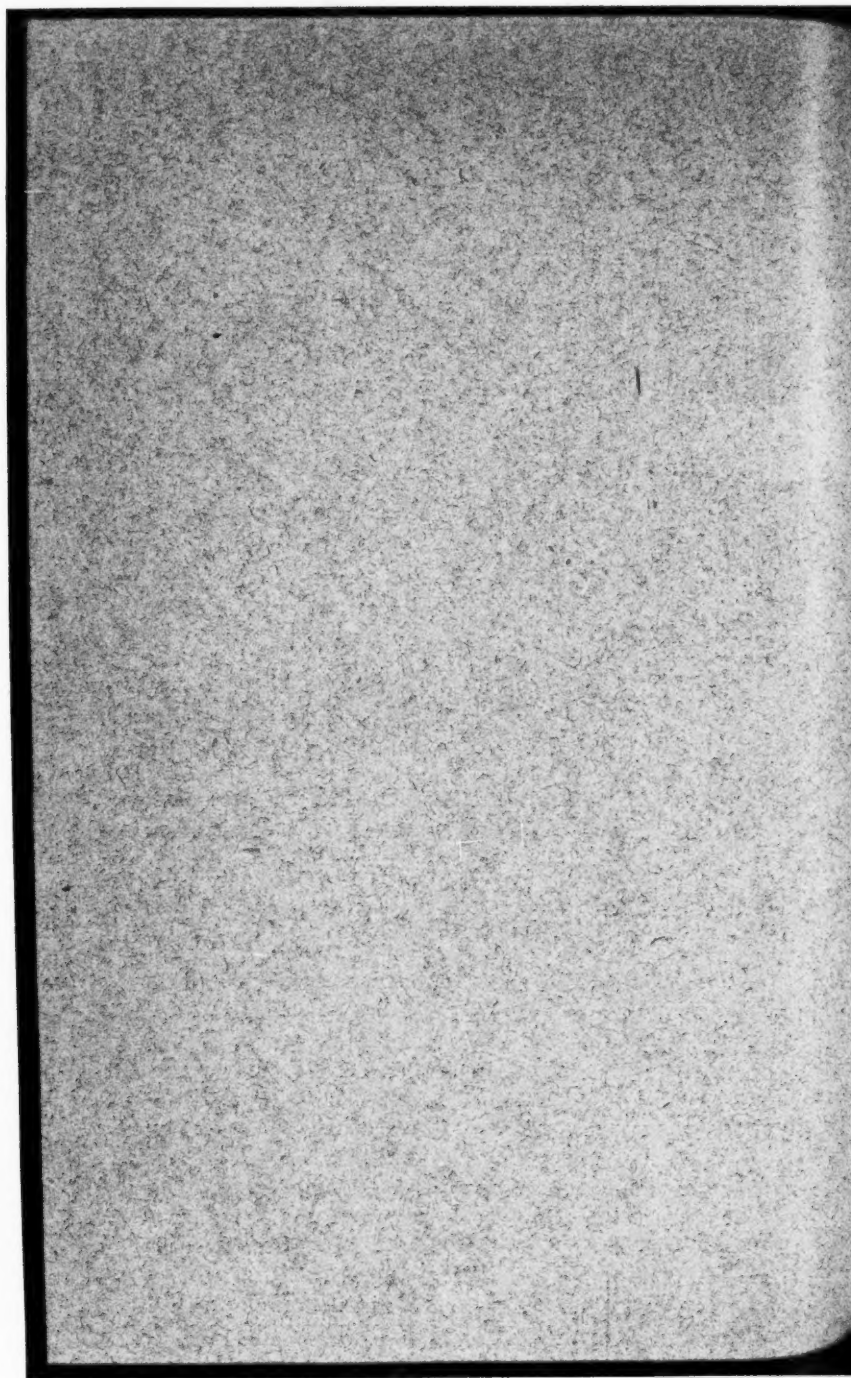
EBEN J. KNOWLTON, *et al.*, Executors, &c.,
Plaintiffs in Error,

against

FRANK R. MOORE, U. S. Collector of Internal
Revenue of 1st District of New York,
Defendant in Error.

Additional Brief for Plaintiff in Error.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.



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FRANK R. MOORE, U. S. Collect-
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District of New York,

Defendant in Error.

**Error to the Circuit Court of the
United States for the Eastern District
of New York.**

STATEMENT.

The plaintiffs in error, and also plaintiffs below, as executors of Edwin F. Knowlton, deceased, pursuant to § 30 of the War Revenue Act of 1898, filed with the Collector, the statement thereby required, and thereupon, under due protest, paid the succession tax assessed, and after due proceedings brought this suit to recover the tax so paid.

The defendant demurred to the complaint. The Circuit Court sustained the demurrer, and gave judgment for the defendant, and plaintiffs sued out this writ of error to this Court.

The sole question is the constitutionality of §§ 29 and 30 of the War Revenue Act of 1898.

The undersigned has been retained in this case but very recently, and at the request of a client having an extremely large interest in the question.

He found elaborate and exhaustive briefs already prepared by other counsel.

These briefs surely cover the whole field of discussion, so far as it is founded on history and authority, and it has therefore seemed not only unnecessary but unwise to repeat what has been so fully and completely done.

The briefs seem also to cover every possible line of argument, and the views the undersigned submits are rather by way of emphasizing the arguments which have struck him as particularly forcible than as contributing anything new to aid in the solution of the problem.

POINTS.

First.—The tax is direct. Every tax that can possibly be laid by any government is a tax on some person or persons, and there is no such thing as a tax on property, or privilege or right, independently of the person owning it.

A moment's reflection of course shows that this is a truism.

Property, *i. e.*, anything other than men, has no rights or obligations. If in *form* a thing is taxed it means that some man or men having certain relations to that thing are taxed.

It is like a judicial proceeding *in rem*, as it is called.

Strictly speaking, there is no such thing as a judicial proceeding *in rem*, but it is a convenient way of speaking of those judicial proceedings where the object is to have the Courts adjudge the rights of all men as to a particular thing and where notice or summons is given to all men by seizure of the "*res*" and by due publication.

What is adjudged however is not any right or obligation of the "*res*," for that is unthinkable, but the rights and obligations of all men in respect to the "*res*."

Precisely the same in respect to a tax.

What is taxed is the right of some person in the *res*.

If there is anything which no one owns it cannot be taxed, and if any person is taxed in respect to things which he does not own or which no one owns (*e. g. fere naturæ*) it becomes a capitation tax and thus again is a tax on persons.

2d. Every tax in a certain sense is a direct tax and *prima facie* every tax is in the legal sense a direct tax.

Every tax must be paid to the government by some person. The person who pays it is, as between him and the government, taxed directly. As to him it is a direct tax.

If no one voluntarily pays the tax, then the tax is enforced against some property.

The person against whose property it is enforced is, as between him and the government, taxed directly. As to him it is a direct tax.

With such payment or with such collection all interest of the government in the tax ceases.

Whether the person paying or suffering collection from his property can in any way recoup himself, from others, the amount of the tax, does not concern the government. Whether he can or cannot no portion of the tax will be returned.

3d. The idea of indirect taxes was conceived by the political economists who were discussing, not ways and means of government, but the ultimate incidence of taxes actually levied.

No one ever claimed that as between government and taxpayer all taxes were not direct.

To the man who imports goods and pays the duty the tax is direct. He may or may not be able to "shift" it, but absolutely as between him and the government the tax, like every other tax, is direct.

The political economists however showed that at least to a large extent the persons who directly paid certain taxes were able to "shift" the burden of such taxes upon the persons who ultimately consumed the goods in respect to which such persons had been taxed; and the phrase "indirect taxes" or "indirect taxation" became the language in which was expressed the thought or idea that a tax was of the character that the person on whom it was directly imposed and as to whom it was a direct tax could, at least to a large degree, shift its burden on others who should become the consumers.

4th. To the extent to which this doctrine

of the political economists was palpably true and became generally accepted the idea of indirect taxes or taxation became a legal and political as well as a philosophical idea.

Statesmen gave it attention in its political relations and the Courts gave it attention in constitutional and legal relations and provisions respecting it were embodied in our constitution.

Up to the time of the adoption of our constitution and even to-day the only kind or classification of taxes as to which governments in their political capacity and courts in their judicial capacity hold that the person directly taxed can "shift" the burden are "duties, imposts and excises."

Now, the words "duties" and "imposts" are synonymous and refer to the tax on imported goods. The word "excise" refers to an inland tax of the same nature as the duties but levied on commodities made or manufactured inland, *i. e.*, in the country.

6th. *Prima facie* therefore a tax is and must be regarded as direct and unless it falls within the *well-recognized* class of indirect taxes known as duties or excises, the burden is on him, who claims it, to show that it is not direct.

7th. The tax involved in this case is plainly not a "duty or impost" and plainly not an "excise."

The reason of the economists for calling these taxes indirect is that the person on whom they were first levied could "shift" them and that in the price the consumer

would ultimately pay the tax, and also that the consumer having the option to purchase or not, if he did so became a voluntary taxpayer.

The reason applies to duties and to excises. The importer or dealer who first pays must be able to "shift" the tax by adding it to the price, and the person on whom as consumer it is shifted must voluntarily assume it by becoming the purchaser.

Unless both these elements are present a tax can be neither a duty nor an excise, but is simply a direct tax.

For this reason Madison condemned the carriage tax decision.

A tax on manufacturers of or dealers in carriages would clearly be an excise, because if not so large as to destroy the business it would be added to the price, and purchase by anyone would be optional.

But a tax on carriages in the hands of and in use by a consumer is not an excise. The tax cannot be shifted and payment of the tax is not voluntary.

A tax on a brewer is an excise because it can be and is shifted and the purchase and consumption by the purchaser are voluntary; but a tax which omits and passes by the brewer and is levied on the man who owns it for consumption is not an excise. No one pretends that he can shift it—no one pretends that payment of such a tax is in any degree voluntary.

It is a direct tax from which he cannot escape.

Of course, in a certain sense all direct and most indirect taxes may be avoided by

any one who chooses to divest himself of all property. Such possibility, however, does not constitute the voluntary assumption of a tax, by the purchase of a taxed commodity, referred to either by the economists or the law.

Both with the economists and with the law that, and that alone, is an excise tax, the burden of which can be "shifted," and which, when assumed, is voluntarily assumed by the consumer. If either of these elements is absent the tax is direct.

8th. Both of these elements are wanting in the law of 1898.

The law, § 29, in so many words taxes the persons who "as administrators, executors and trustees have in charge any legacies or distributive shares," &c.

So far this is clearly a direct tax on the administrators, &c., in respect to the property and on the beneficiaries for whom such property is held.

Omitting the administrators, etc., who hold only in trust, the tax is substantially on the beneficiaries in respect to the property devised or inherited.

Can the burden of this tax be shifted? If we turn to the political or legal aspect of the question we look in vain for any law, practise or adjudication in any way suggesting an affirmative answer.

If we turn to the discussions of the economists our efforts to find a suggestion of an affirmative answer are equally vain.

Seligman in "Incidence of Taxation," p. 299, says, "A tax on inheritances or bequests cannot be shifted, for evidently there is no one to whom it could be trans-

ferred. The ulterior efforts of which some writers speak, such as the influence of inheritance taxes on the accumulation of capital do not really illustrate the process of shifting."

The reason why it cannot be transferred even if the bequest is of a stock of goods which the legatee can only use by selling on the market *e. g.* contents of a brewery, etc., etc., is that the tax can not possibly be added to the price.

Inheritance taxes are but occasional and upon a death. The cost to the producer of the great mass of the goods for sale on the market does not include an inheritance tax. Consequently when one who has paid an inheritance tax tries to sell his inherited goods he comes into competition with those who have paid no such tax, and he can get no higher price than do they who have paid no tax. The inheritance tax thus becomes a dead loss. It was direct and it cannot be shifted. No one who purchases will pay the tax in the price.

Nor is it of the least consequence in this discussion whether the tax be considered as assessed upon the right to inherit or take by will or on the property inherited or bequeathed.

In either case it is a direct tax on the person, administrator etc., or beneficiary, which cannot be shifted and in both cases the thing sold (the right to inherit or the thing inherited) cannot be sold at a price which shall include the tax.

9th. In making this argument we raise and rely upon no theories or speculations of economists or other philosophers.

On the contrary we submit that in the plain and ordinary use of terms as commonly understood by those interested in the subject, the words "duties, imposts and excises" have a meaning which excludes inheritance taxes whether levied on the property or on the right to take by inheritance or bequest, whether the distinction between them be or be not a distinction without a difference.

We say first that the economists never claimed that an inheritance tax could be shifted.

We say next that even if they had, such claim has never been accepted or acknowledged either in legislation or judicial judgments so as to give the slightest warrant for the inference that it could have been understood by the framers of the constitution to be included in the terms "duties, imposts and excess" and to be excluded from the terms "direct taxes."

This Court, after great discussion and exhaustive investigation has definitely held that the term "direct taxes" and "direct tax" are not limited to capitation and land taxes, but include such other taxes as are generally recognized as direct and which cannot be shifted, and has also held that it will not be controlled by the theories and speculations of economical philosophers.

And well may it have come to that conclusion, for surely, if it did otherwise, it would be no difficult undertaking to show that the burden of a land tax in many cases can be, and is, shifted on tenants and purchasers. Especially is this so in urban

and suburban lands, whose value comes from use other than agricultural.

But independently of the theoretical question, whether a land tax can or cannot be shifted, the fact is plain that at the time of the adoption of our constitution the doctrine that it could be shifted, had not been so accepted in political or judicial circles as to warrant the judicial inference that it was excluded from the term "direct taxes" or included in the terms "duties, imports and excises."

10th. Infinitely more emphatically is the inference a necessary one, that it was not intended to include in the term "excise" an inheritance tax which not only no legislation and no adjudication but no economist up to this time or since has ever claimed to possess the qualities of an excise tax in the possibility of being "shifted," or in the remotest chance that the purchaser would in the price pay the tax.

It has been suggested that wherever the purchase or ownership of a commodity is optional, a tax on such commodity falls under the classification of "excise." That in such case it is not only an "excise" but that it is not "direct."

The suggestion is true if the consumer pays the tax in the price; it is as clearly untrue if the tax is not paid in the price but is assessed and levied on the purchaser after the purchase.

In the one case the purchaser has the option. He can purchase or not.

In the other case he has no option. The tax is levied directly on him and as he is

the consumer and not a dealer it is clearly impossible that he should shift the tax on any one else.

11. If it be suggested that in the Hylton case the person taxed was the consumer we answer that that fact constituted the plain error of that case, and we further submit that that error could never have been committed and that the decision in that case and in the case of *Scholey vs. Raw* could never have been made by a Court not imbued with the idea that the direct tax referred to in the Constitution must be construed as confined to a capitation tax and a tax on land.

12. Had the discussion at that early day arisen over an inheritance tax, we submit that its character as direct would have been so plain that the prejudice or tendency of thought to define a direct tax as including none but a capitation tax and a tax on land would not have prevailed against it.

13. The one feature of an inheritance tax that it is levied only on the occasion of a death eliminates every possibility of its being other than a direct tax. Annual taxes, if uniform, affect all alike. No one going into the market as a seller can escape their effect.

An inheritance tax, however, affects but one or very few at a time.

All other sellers can fix their price, based on the cost of production, exclusive of any inheritance tax.

Such a tax does not and cannot affect cost of production; it affects only the individual taxed. He must sell at the mar-

ket price fixed without reference to the inheritance tax, which he must pay with no possibility of shifting it.

The inheritance tax has the same effect so far as shifting is concerned as would a tax on a single individual by name—leaving all others untaxed.

Such a tax would be direct and could by no possibility be shifted.

This inheritance tax has the same effect.

If we take the present average of life at say forty years; then once in forty years is the average frequency with which an inheritance tax could be levied on any property and as to a large proportion of property disposed of *inter vivos* it would not be even that.

That such a tax could be shifted is surely unthinkable either in philosophy or law.

14. We have stated many things in reference to what economists, legislation or adjudications have or have not done, and we have made no citations.

The omission is of purpose. We intend to make no statement either pro or con which will be challenged by any one. We will, however, give one reference, viz., Professor Seligman's book edition of 1899 on the "Incidence of Taxation." We give this reference not as substantiating any theory but merely because the book is a history or collection of the ideas or thoughts of economists on taxation for some hundreds of years.

If views have been entertained which therein are not narrated, it is a fair inference that they have made so slight impression as in this discussion to be a negligible quantity.

Second.—The distinction under State laws between a tax on the right of succession and a tax on the property transmitted by law or by will has no application to the question, whether within the meaning of the constitution this tax is direct, and if it had this tax is plainly a tax on property and not on the right of succession.

1. The distinction between a tax on the right of succession and a tax on the property passing thereby or thereunder, is so far as the question of direct tax by the United States is concerned, a distinction without a difference and does not affect the direct character of the tax.

A tax on the right of succession falls on the same person, must be paid by the same person, is a lien on the same property, is subject to the same first and ultimate incidence as if it were or be considered as a tax on property.

There is not an element or qualification which has ever been considered inclusively or exclusively as essential to a direct tax or to a tax being considered as direct which does not apply with absolute precision in the same manner to a tax on the succession as to a tax on the property.

The argument that in respect to being a direct tax the circumstance that *in form* it is levied on the succession and not on the property is not material, is a distinction without a difference, is vastly less cogent in respect to an inheritance tax than as to an income tax and yet the very gist of the recent decisions of this Court in the income tax cases is that the tax on income varies in form only and not

in substance from a tax on the property from which the income is derived.

So this Court has held that a tax on a bill of lading is the same thing as a duty on the article which it represented—a tax on the interest payable on bonds is a tax not upon the debtor but upon the security—that a tax upon the amount of sales of goods made by an auctioneer is a tax on the goods sold. “The substance and not the shadow determines the validity of the exercise of the power” (Pollock case, 157 U. S., and cases cited on p. 582).

What possible difference, then, as distinguished from distinction, can be found in the directness of this tax, whether called a tax on the property or a tax on the succession.

Whatever name is given to it, it affects the same persons, the same property and is enforced in the same way.

When we speak of the right to succeed to an object it is the same thing as property in the object.

The word “property” does not denote the article or object merely, it denotes the relation of some person to that object.

The wild bird or animal is not property. Reduced to possession, *i. e.*, to a definite relation to a certain person it becomes property.

The right to a succession in the abstract is not property. It lacks an object. The right to the succession to a certain object is *property* and is not distinguishable from property in such object derived in any other way.

All the meaning that possibly can be attributed to it is that *property* derived

from succession shall be taxed in a particular way ; but to say that such tax is on the object or on the right is to vary the "form" and not the substance ; is to express a distinction without a difference ; is to play with shadows rather than to recognize realities.

When the tax is levied or assessed it is and must be levied or assessed against some living person. The deceased cannot be assessed ; he is forever beyond the jurisdiction. The persons who after the decease of the testator or intestate own the property are those against whom it is levied. Unless there is an object which had been the property of the deceased and which after his decease became the property of some one else, no tax is levied.

Now I submit that under such circumstances the words "right to inherit or to take by will" such property is simple tautology for "ownership" of such property.

The two expressions are absolutely synonymous, mean with mathematical precision the same thing. If a tax on one is direct so is one on the other and *vice versa*.

Refinements in words and phrases, artful dodges by which the form and not the substance is varied, distinctions founded on the words and not the meaning are to the last degree to be discouraged in the practical administration of the law and most of all in the administration of tax laws.

They are efforts to evade where no evasion should be permitted and no clearer evasion can be imagined than the effort to distinguish the incidence of a tax law on the ownership of an object from one on the right to own it.

2. But even as a distinction and without regard to whether there be a difference, this law is a tax on the property and not on the right.

The law taxes the whole property in the hands of the administrators, &c., and requires them to deduct from the whole property a certain amount from the share of each beneficiary.

This amount varies in two respects. 1st. In respect to closeness of kinship. 2d. In respect to the amount of the whole estate.

The first has relation to the beneficiary. The second has no relation to the beneficiary, but has relation only to the amount of the estate of the deceased.

Now, how can a tax be said to be levied on the right of succession which is levied independently of the right of succession?

A as legatee has a right of succession to \$10,000. He has no other interest in the estate. According, however, to the size of the estate to all of which except the \$10,000 others have the right of succession, A's legacy is taxed more or less. He is thus taxed for property to which others succeed. Such a tax is plainly on the object and not on the right of succession. The object is taxed in the hands of the administrator, and according to the amount of the estate, although A's interest in such object and right of succession thereto have no relation to the amount of the whole estate.

Third.—On the other points raised in the briefs of my associates I submit the case on their briefs.

I do not argue them because I have nothing to add to the reasons so cogently expressed in their briefs.

It seems difficult to imagine how a tax can be called "uniform throughout the United States," which excludes, by not including, the District of Columbia. It seems difficult to imagine how a tax can be called "uniform" which is based on the purely arbitrary distinction of the size or amount of the object passing to some one because of the death.

I however submit those questions without further remark.

Fourth.—The judgment should be reversed, the demurrer overruled and judgment ordered for the plaintiff on the demurrer.

WHEELER H. PECKHAM,
Of Counsel for Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED
STATES.

No. 451. Of October Sessions, 1899.

*The Fidelity Insurance, Trust and Safe Deposit Company, Ex-
ecutor under the Will of Daniel Craig, deceased, Plaintiff in
Error,*

vs.

Penrose A. McClain, Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

PAPER BOOK OF THE PLAINTIFF IN ERROR.

I. STATEMENT OF THE CASE.

This was an action brought by the Fidelity Insurance, Trust and Safe Deposit Company, executor under the will of Daniel Craig, deceased, against Penrose A. McClain, Collector of Internal Revenue for the First District of Pennsylvania, to recover an amount paid by the plaintiff to the defendant under protest, after the same had been assessed as a tax by the defendant against the plaintiff under the provisions of sections 29, 30, and 31 of an Act of Congress, approved June 13th, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes." An appeal to the

Commissioner of Internal Revenue having been taken under the provisions of section 3226 of the Revised Statutes, and the appeal having been refused, an action at law was brought by the plaintiff against the defendant in the Court of Common Pleas for Philadelphia County for the recovery of the money thus paid. In the statement of plaintiff's demand, which under the Pennsylvania practice takes the place of the declaration at common law, the facts were set forth and recovery claimed upon the ground that the Act of Congress, under which the tax was assessed and payment exacted, was in derogation of rights secured to citizens by the Federal Constitution in the following respects:—

(a.) That if the tax imposed by the Statute was a direct tax, it did not conform to the rule of apportionment prescribed by article I., section 2, paragraph 3, which is as follows:

“Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers.”

(b.) If the tax assessed was an indirect tax, then it failed to conform to the rule of uniformity prescribed by article I., section 8, which is as follows:—

“The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.”

(See Record, page 6.)

The defendant, in accordance with the provisions of the Revised Statutes, removed the case from the Court of Common Pleas of Philadelphia County to the Circuit Court of the United States for the Eastern District of Pennsylvania and there filed a demurrer, taking issue upon the question at law raised by the plaintiff's averments as to the unconstitutionality of the Act of June 13th, 1898.

The case having been heard upon this demurrer, the demurrer was sustained, and by direction of the court judgment was entered for the defendant. (See record, page 13.) To this judgment a writ of error was taken by the plaintiff.

II. ASSIGNMENTS OF ERROR.

First.—That the court erred in sustaining the demurrer to the plaintiff's statement of claim, because by the statement of plaintiff's demand it appeared that the tax assessed against the plaintiff and exacted by the defendant was illegal, because the Act of Congress approved June 13th, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes," was in derogation of the provisions of article I., section 8, of the Constitution of the United States, which reads as follows:—

"The Congress shall have the power to lay and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

Second.—That the court erred in sustaining the demurrer to the plaintiff's statement of claim, because by the statement of plaintiff's demand it appeared that the tax assessed against the plaintiff and exacted by the defendant was illegal, because the Act of Congress approved June 13th, 1898, entitled "An Act to provide ways and means to meet war expenditures and for other purposes," was in derogation of the provisions of article I., section 2, paragraph 3, of the Constitution of the United States, which reads as follows:—

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

III. ARGUMENT.

In the brief filed, by leave of the court, on behalf of the Fidelity Insurance, Trust and Safe Deposit Company in *High vs. Coyne*, Collector, No. 225, October Term, 1899, we have fully expressed the argument which we desire to submit to the court, and will not repeat the same at length. We, therefore, shall confine ourselves to stating an abstract of the same, as follows:—

(a.) Congress has no power to legislate with reference to the devolution of estates of decedents, or to regulate or con-

trol the exercise of the testamentary power of citizens of the several States. Legislative control over these matters is vested solely in the States. Hence an Act of Congress directing payment into the Federal treasury of a certain percentage of decedents' estates cannot be sustained as an exercise of the legislative power regulating the devolution of decedents' estates. If upheld, it must be sustained as a valid exercise of the Federal taxing power.

Pages 5 to 10.

(b.) The tax imposed by the Act of June 13th, 1898, is not an excise upon the right to receive a legacy or distributive share of a decedent measured by the amount received, but a tax upon the property of decedents in the hands of the executor or administrator measured by the aggregate amount of the estate after the payment of debts—the rate of taxation increasing by a graduated scale whereby estates are divided into six classes for purposes of taxation.

Pages 10 to 14.

(c.) A tax imposed upon property as such, not being an excise upon the receipt of a legacy or upon the right to take a distributive share in a decedent's estate, is a direct tax within the meaning of the Federal Constitution, and hence must be apportioned among the States in proportion to the census.

Pages 14 to 30.

(d.) If the tax imposed be regarded, not as a direct tax, but as an excise, then Congress has failed to follow the constitutional rule of uniformity by directing that the tax be levied in accordance with a graduated scale, whereby the rate of taxation increases as estates pass from a lower to a higher class for assessment—the line of demarcation between the several classes being simply a variation in the aggregate net amount of the estate of the decedent.

Page 30.

(e.) The rule of uniformity in taxation prescribed by the Constitution is not satisfied by a mere geographical uniform-

ity. A uniform rate of taxation upon the same subject matter wheresoever situate within the limits of the taxing power is necessarily involved.

Pages 30 to 40.

(f.) To justify classification for taxation there must be substantial differences between the subject matters which are placed in the several classes, and the difference must relate to the subject matter which is classified—therefore accidental or collateral circumstances cannot be made the basis of classification. While the courts will not review the legislative discretion involved in classification so long as the power is exercised upon rational lines, the courts have not hesitated to declare void statutes which, if upheld, would involve a fraud upon the power.

Pages 40 to 50.

(g.) A classification, the only basis of which is that the unit of taxation is found with certain other units of specified number in a common ownership, is without reason—nay, more, it violates the fundamental American principle that the law makes no distinction between the rich and poor.

Pages 50 to 52.

(h.) Any sanction to such distinction, either by legislative act or judicial decree, is calculated, by placing the burdens of government upon wealth, in the end to deprive the people at large of their due share in the conduct of government. That the powers of government are exercised by those who bear its burdens is the uniform testimony of history, and any class relieved by law from responsibility for the support of the State soon loses those characteristics of free citizenship which qualify it for participation in the privilege of a free government.

Pages 52 to 53.

(i.) Review of State decisions.

Pages 53 to 64.

The only additional matter which has come to our notice since the preparation of the first brief is found in the work upon the Growth of the Constitution in the Federal Convention of 1787, recently published by William M. Meigs, Esq., of the Philadelphia Bar. In this work the author has traced, by reference to the minutes of the convention and its several committees, the growth of each article, section and clause of the Constitution. We take the liberty of reprinting the result of Mr. Meigs' investigations as to article I., section 8, clause 1 (pages 128 to 134).

"ARTICLE I., SECTION 8, CLAUSE 1.

"The Congress shall have power to lay and collect taxes, duties, imposts and excises to pay the debts and provide for the common defence and general welfare of the United States ; but all duties, imposts, and excises shall be uniform throughout the United States."

Charles Pinckney's speeches show that his draft conferred on the general government complete power to levy such imposts and duties for the use of the United States as Congress should think necessary and expedient, but he seems to have required a two-thirds vote in these cases ; he said that he thought this power would remove that annual dependence on the States which they then experienced. In the Committee of Detail we find that the first power contained in Randolph's draft was—

"1. To raise money by taxation, unlimited as to sum, for the past and future debts and necessities of the Union, and to establish rules for collection."

But this he made subject to the exception of "no taxes on exports," and to the following restrictions:—

"1. Direct taxation proportional to representation.

"2. No capitation tax which does not apply to all inhabitants under the above limitation.

"3. *No indirect tax which is not common to all.*"

These provisions are, moreover, marked on the margin "argd," as if they had been submitted to the members of the committee at some time ; but the following is the form in which they finally reported the matter:—

"Article VII., section 1. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises."

When this came up before the Convention on August 16th there was some slight discussion as to the exact meaning of the words "duties" and "imposts," and then Mason moved a proviso to the clause as follows: "*Provided*, That no tax, duty, or imposition shall be laid by the Legislature of the United States on articles exported from any State;" and he said he hoped the Northern States did not mean to deny the Southern States this security. He was unwilling to trust to its being done in a future article (referring to a future section [4] of the same article), and professed his jealousy for the productions of the Southern or staple States. Williamson, Gerry, Mercer, Sherman, and Carroll supported the motion, while Gouverneur Morris, Madison, and Wilson were against it. Sherman thought the matter sufficiently provided for already in the later section, and was against the proviso here, because it would derange the plan. It was finally agreed that the matter should lie over for the place in which the exception stood in the report, and the clause as reported was agreed to.

On August 21st, Luther Martin moved, in the form of an amendment to article VII., section 3, a provision to require that direct taxes should be first apportioned among the States in accordance with the rule decided on, and that then requisitions should be made on the States for their respective quotas, and that laws for the collection of the same should only be enacted in case of the States' neglect to comply; but only New Jersey voted in favor of the proposal.

On August 23d, the clause as to the power to lay and collect taxes was amended to read as follows, the proportion prefixed being temporarily transferred here from another part of the Constitution, where it had originated and where it found its permanent lodgment (article VI., clause 1): "The legislature shall fulfill the engagements and discharge the debts of the United States, and shall have the power to lay and collect taxes, duties, imposts, and excises." This amended clause was agreed to, but Butler gave notice of a motion to reconsider, lest it should compel payment to the "bloodsuckers" who speculated, as well as to those who had bled for this country.

According to a vote on August 24th, the Convention proceeded on August 25th to reconsider the portion thus transferred to this clause as to fulfilling the engagements of the United States. Mason objected to its being imperative, and thought it might be impossible. He thought it would beget speculations, and argued that there was a great difference between original holders and those who had fraudulently purchased in the pestitential practice of stock jobbing. He did not mean to include those who had bought in the open market. He feared, also, that the word "shall" might extend to all the old Continental paper. After a short discussion, Randolph proposed to make the clause read: "All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States, under this Constitution, as under the Confederation ;" and this was adopted by ten States to one.

Sherman then suggested the necessity of connecting with the clause in the latter part of this section for laying taxes, duties, &c., an express provision for the object of the old debts, and accordingly moved to add to its end "for the payment of said debts, and for the defraying the expenses that shall be incurred for the common defense and general welfare." The convention, however, thought this unnecessary, and disagreed to it.

On August 18th Charles Pinckney had introduced into the convention a series of resolutions, and had them referred to the Committee of Detail ; among them was a suggestion that the Committee be directed "to prepare a clause, or clauses, for restraining the Legislature of the United States from establishing a perpetual revenue." A like suggestion of Mason of August 18th was also referred to the same Committee. The Committee reported on August 22d, recommending that the end of the first clause of the first section of the seventh article, after the words "shall have power to lay and collect taxes, duties, imposts, and excises," the following should be added: "for payment of the debts and necessary expenses of the United States ; provided that no law for raising any branch of revenue, except what may be specially appropriated for

the payment of interest on debts or loans, shall continue in force for more than years." This proposal was not called up or acted on, so it went to the Committee on Unfinished Portions; and on September 4th Brearly reported from it a recommendation that the first clause of the first section of article VII. should read: "The legislature shall have the power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and provide for the common defense and general welfare of the United States;" and this was at once agreed to *mem. con.*, and later referred to the Committee on Style.

This clause had, as has been seen, been preceded by the provision that "the legislature shall fulfill the engagements and discharge the debts of the United States;" and this was also referred to the Committee on Style. They transferred it back to that portion (article VI., clause 1) from which it had been for a time transferred here, and then reported the portions of the clause here concerned, as follows:—

"SECTION 8. (The Congress.) * * * They shall have power to lay and collect taxes, duties, imposts, and excises; to pay the debts, and to provide for the common defense and general welfare of the United States."

During the comparison of the report of the Committee on Style, with the articles agreed on, on September 14th, on motion of Gouverneur Morris, the following words were unanimously added to this clause:

"But all duties, imposts, and excises shall be uniform throughout the United States."

This was not a new idea of Morris's, but merely a transfer to this clause of matter which had originated in another part of the Constitution during the discussions which resulted in the prohibition (article I., section 9, clause 6) against giving any preference to one port of another. On August 25th McHenry and Charles Cotesworth Pinckney had moved a resolution, a portion of which read, "All duties, imposts, and excises, prohibitions, or restraints laid or made by the Legislature of the United States, shall be uniform and equal throughout the

United States," and this was at once referred to a special committee of one member from each State, to which were also referred other resolutions introduced the same day in regard to ports of entry and the giving of preferences to one port over another. This committee consisted of Langdon, Gorham, Sherman, Dayton, Fitzsimmons, Read, Carroll, Mason, Williamson, Butler, and Few; and from it Sherman reported on August 28th, recommending certain provisions, among which was an insert after the fourth section of the seventh article, a provision as to not giving preference to one port over another (see article I., section 9, clause 6), and the following words: "And all tonnage, duties, imposts, and excises laid by the Legislature, shall be uniform throughout the United States." The latter clause was agreed to on August 31st, after the word "tonnage" was struck out as being comprehended in "duties," but it seems to have been forgotten by the Committee on Style; it was no doubt the source of Gouverneur Morris's motion. (Meigs on the Growth of the Constitution, pages 128-134.)

The phrase as agreed on in the Committee of Detail, "No indirect tax which is not common to all" expresses with as great emphasis as language will permit the fundamental idea that in all matters relating to the levying of indirect taxes equality and uniformity shall be the unvarying rule. "Common to all," imports that as to all persons, subject to the taxing power, the legislature shall make no discrimination. This is not inconsistent with classification, but when the class has been determined and the subject matter of the tax specified, no arbitrary distinction can be invoked as a means whereby unequal burdens may be imposed.

With this additional suggestion we submit this case in connection with the brief heretofore filed, and ask that the judgment of the Circuit Court be reversed.

RICHARD C. DALE,
SAMUEL DICKSON,
JOHN C. BULLITT,
For Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED
STATES.

*The Fidelity Insurance, Trust and
Safe Deposit Company, Executor
under the will of Daniel Craig,
deceased, Plaintiff in Error,*

vs.

*Penrose A. McClain, Defendant in
Error.*

} October Sessions, 1899.

} No. 451.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR COMPLAINANT IN ERROR *SUR*
ORDER OF FEBRUARY 26TH, 1900.

The question at issue as formulated in the order of court
is:—

“Whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or by the amount of the legacy.”

We approach the discussion fully recognizing that a rule of gradation measured by the amount of the legacy might seem to have a basis in reason which could not exist when the gradation was measured by the total amount of the estate passing in legacies or distributive shares; and hence in order that the statute should have the most reasonable construction every intendment will be made in favor thereof.

But after giving full operation to this rule of interpretation, we submit that the language of the statute admits of no other

construction than that placed upon it by the Government in enforcing its provisions against the citizen and that the measure of the tax is the total volume of the estate passing in legacies or distributive shares and not the amount of each particular legacy.

We print as an appendix to this brief, sections 29 and 30 of the Act of June 13th, 1898, and immediately thereafter sections 124 and 125 of the Act of June 30th, 1864. (13 Statutes at Large, pages 285, 286.)

It will be perceived that the Act of 1898 is a literal copy of the Act of 1864, with these exceptions: In the fourth line of the first paragraph the exemption is increased from \$1000 to \$10,000, and clauses are inserted providing for an increase in rate as the "amount or value of said property shall exceed" the specified figures which are the dividing lines of the several classes.

Under the Act of 1864 it was the unquestioned construction that the exemption was limited to estates the entire volume of which passing in legacies or distributive shares did not exceed \$1000. The maxim applies: *Contemporanea expositio est optima et fortissima in lege.*

The construction given to the Act of 1898 by the Government in enforcing its provisions is in accordance with the same understanding of the language found in the statute. The decisions made in the office of the Commissioner of Internal Revenue under the advice of the Department of Justice present a clear and unanswerable argument for this construction.

But passing from these matters, which are only pointers to the proper answer to the question at issue, we will take up the statute itself.

The subject matter of the tax is:—

"Legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value passing after the passage of this Act from any person possessed of such property, either by will or by the intestate law of any State or Territory, * * * to any person or persons or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States."

It will be noticed that while the definition of the subject taxed opens with the general words—

“Legacies or distributive shares arising from personal property,”

The generality of the language is immediately qualified by the additional words :—

“Where the *whole* amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value passing after the passage of this Act from any person possessed of such property either by will or by the intestate laws.”

These qualifying words divide legacies and distributive shares into two primary classes :—

(a.) Those where the *whole* amount of such property passing from the decedent in legacies or distributive shares exceeds \$10,000.

(b.) Those where the whole amount of such property does not exceed \$10,000.

Class (a) is taxed and class (b) is not taxed.

The language used in this clause could never be construed as importing a legislative intent to place in the taxed class only such legacies and distributive shares which, standing separately from other legacies passing from the same decedent, exceeded \$10,000, and to place in the exempt class all legacies or distributive shares which, by themselves, did not exceed \$10,000.

To place in the exempt class all legacies not exceeding \$10,000, which is the inevitable consequence of adopting the construction contrary to that for which we contend, would do violence to the plain words of the statute :—

“Whole amount of *such* personal property * * * shall exceed the sum of \$10,000 * * * passing * * * from any person possessed of such property, either by will or by the interstate laws.”

That this definition of the subject matter taxed is accurate, may be seen by considering the anterior reference of the word “such” preceding the words “personal property.” It points to the preceding line, “whole amount” of “legacies or distributive shares arising from personal property” in charge of “executors, administrators,” &c. The sum total of the legacies, &c.

in the hands of the executors is the subject taxed if such sum total exceeds \$10,000, if not, the fund in the hands of the executor is exempt.

If we have correctly stated the classification prescribed in the first paragraph of section 29—

(a.) Taxed estates in which the whole amount of personal property passing from a decedent in legacies or distributive shares exceeds \$10,000, and

(b.) Exempt estates in which the whole amount so passing does not exceed \$10,000,

The proper construction of the remaining paragraph of the section in which the amount or measure of the tax is prescribed is not difficult.

It will be observed that all through the following clauses the distinction is drawn between "the *whole* amount of said personal property," referring to the whole estate passing from the decedent in legacies or distributive shares, and "value of such interest in such property," as defining that which the legatee or distributee actually receives.

In the classification introduced by the draughtsman of the statute whereby the rate of tax increased with the amount, the language following that used a few lines above in expressing the distinction between the taxed subject matter and the exempt subject matter, is:—

CLASS 1. "Where the *whole amount of said personal property* shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be * * *."

And the progressive rate as the amount increases is set forth in appropriate language showing that the basis of increase was the *property* of the decedent and not the value of the *interest* therein to be received or enjoyed as a legacy or distributive share by each separate beneficiary.

CLASS 2. "Where the amount or value of *said property* shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rate of duty or tax above set forth shall be multiplied by one and one-half.

CLASS 3. "Where the amount or value of *said property* shall exceed the sum of \$100,000, but shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by two.

CLASS 4. "Where the amount or value of *said property* shall exceed the sum of \$500,000, but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by two and one-half.

CLASS 5. "Where the amount or value of *said property* shall exceed the sum of \$1,000,000, such rates of duty shall be multiplied by three."

This is a progressive gradation of the tax based upon the value of the whole amount of property passing from the decedent in legacies or distributive shares.

In the classification which is incident to the relationship of the legatee or distributee to the decedent, the draughtsman of the statute uses appropriate language to designate the legacy or distributive shares of each recipient.

"Where the person * * * entitled to any beneficial interest in *such property* shall be the lineal issue, &c., to the person who died possessed of *such property* as aforesaid, at the rate of seventy-five cents for each and every \$100 of the clear value of *such interest* in *such property*."

And in appropriate language the rate for each \$100 of the clear value of *such interest* is increased through the five classes as the degree of consanguinity becomes more remote.

But as is shown in convenient form in the table printed at page 4 of our original brief, the rate for distributees in the same degree of consanguinity increases in a gradation of five classes, depending upon the whole amount of the personal property passing in legacies or distributive shares either by will or by the intestate laws from the persons theretofore possessed of the same.

This clear and unequivocal expression of legislative intent must overcome any argument based upon the greater reasonableness of a tax system whereby a legacy of \$20,000 would be subject to the same tax whether it was received from a decedent leaving \$25,000 or from an estate of \$2,000,000. The question before the court is not which is the more reasonable system of taxation. It is, what does the statute clearly express as the intention of the legislature? We submit that a consideration of the words of the statute leaves the question as one not open to doubt.

RICHARD C. DALE,
For the Fidelity Insurance, Trust and
Safe Deposit Company.

APPENDIX.

Act of June 13th, 1898:—

SEC. 29. That any person or persons having in charge or trust as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust, or otherwise, shall be, and hereby are made subject to a duty or tax, to be paid to the United States as follows—that is to say: Where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed in value the sum of \$25,000, the tax shall be:—

First.—Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every \$100 of the clear value of such interest in such property.

Second.—Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every \$100 of the clear value of such interest.

Third.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of

the father or mother, or a descendant of a brother or sister of the father or mother, of the persons so died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth.—Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one-half, and where the amount or value of said property shall exceed the sum of \$100,000, but shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of \$500,000, but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of \$1,000,000, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as

aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall neglect or refuse

to deliver the schedule, list, or statement of such legacies, property, or personal estate under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interest therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer, lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this Act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid,

shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this Act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of \$500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government.

Act of June 30th, 1864:—

SEC. 124. *And be it further enacted*, That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of \$1000 in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, that is to say:—

First.—Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister, to the person who died possessed of such property, as aforesaid, at the rate of one dollar for each and every \$100 of the clear value of such interest in such property.

Second.—Where the person or persons entitled to any beneficial interest in such property shall be a descendant of a

brother or sister of the person who died possessed, as aforesaid, at the rate of two dollars for each and every \$100 of the clear value of such interest.

Third.—Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed, as aforesaid, at the rate of four dollars for each and every \$100 of the clear value of such interest.

Fourth.—Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed, as aforesaid, at the rate of five dollars for each and every hundred dollars of the clear value of such interest.

Fifth.—Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of six dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty.

SEC. 125. *And be it further enacted*, That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector

of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the assessor or assistant assessor of the said district a schedule, list, or statement, in duplicate of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered thereon, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person, paying such duty or tax, a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee, to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said assessor or assistant assessor a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons

entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the assistant assessor shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon, and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment, or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this Act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die as aforesaid, shall exhibit the same at the request of the assessor or assistant assessor of the district, and to any law officer of the United States, in the performance of his duty under this Act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody, *and* (any) such records, files, or papers, shall refuse or neglect to exhibit the

same on request as aforesaid, he shall forfeit and pay the sum of \$500: *Provided*, (That) in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government.





First Term

1899

George D. Greenman, Plaintiff in Error,
vs.
John M. Wain, Collector, etc., Defendant in Error.

George D. Greenman,
Plaintiff in Error,

The United States,
Defendant in Error.

No. 413.

Brief for Plaintiffs in Error.

CHARLES E. PATTERSON,
Of Orchard

CHARLES E. PATTERSON,
ALPHEUS T. BULKELEY,
Attorneys for Plaintiffs in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as
Executor of the last will
and testament of Jane H.
Sherman, deceased,
Plaintiff in Error,
vs.

No. 458.

JOHN G. WARD, Collector of
Internal Revenue for the
Fourteenth District of the
State of New York,
Defendant in Error.

GEORGE D. SHERMAN,
Plaintiff in Error,
vs.

No. 459.

THE UNITED STATES,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

Both the cases above entitled involve the question of the constitutionality of sections 29 and 30 of what is commonly known as the "War Revenue Law," which is an Act of Congress entitled "An Act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898. The facts set forth in

the two cases are substantially the same. The two actions have been brought, and the two alleged causes of action are intended to be stated so as to present the questions involved in such different ways, that the Court must of necessity pass upon the plain question involved.

In the first of the two actions, Mr. Murdock, as executor of the will of Jane H. Sherman, having paid under protest the tax required by the provisions of the law referred to, and having appealed in statutory form to the Commissioner of Internal Revenue, who rejected his appeal, brought his action in the proper state Court against the Collector of Internal Revenue, to recover back the amount of the tax which had been paid. The government, defending its Collector, removed the case from the state Court to the Circuit Court of the United States, and interposed a demurrer to the complaint of the plaintiff, which demurrer was sustained by the Court, and by the Court judgment was ordered sustaining the demurrer, and dismissing the complaint with costs. Judgment was accordingly entered, and the plaintiff sued out his writ of error, and has brought the case to this Court.

His assignment of errors is as follows:

ASSIGNMENT OF ERRORS.

Now comes George T. Murdock, executor of the last will and testament of Jane H. Sherman, deceased, by his Counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Circuit Court of the United States for the

Southern District of New York, in the Second Judicial Circuit, in the above entitled cause, and assigns error thereto, as follows:

1.—The Court erred in sustaining the demurrer and dismissing the appeal of plaintiff herein.

2.—The Court erred in refusing to find as was claimed by the plaintiff in error, that the imposition of the tax described in the complaint against the plaintiff in error, because of his ownership as executor of the last will and testament of Jane H. Sherman, deceased, of the property mentioned in the complaint, was unconstitutional, unlawful and void.

3.—The said Court erred in not deciding that the imposition and collection of said tax deprived this deponent of his property, and the estate represented by him of its property, without due process of law.

4.—Such Circuit Court erred in refusing to find that the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

5.—The said Circuit Court erred in refusing to find that the law imposing said tax denied and does deny to persons throughout the United States, and within its jurisdiction, the equal protection of the laws.

6.—The Court erred in refusing to find that the law under which said tax was imposed, denies to the plaintiff in error the equal protection of the laws.

7.—The Court erred in refusing to find that the tax so imposed is a direct tax, and is void because not apportioned among the states, in proportion to their popu-

lation, and in accordance with the provisions of the constitution of the United States.

8.—The said Court erred in refusing to find that if said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the constitution of the United States.

9.—The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York.

10.—The Court erred in refusing to find, that in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint, and which was assessed against the plaintiff in error, because of his ownership as executor as aforesaid, of such bonds of the government of the United States.

11.—The Court erred in not overruling the demurrer to the said complaint.

In the case of *Sherman v. The United States*, the petition alleges that the plaintiff is entitled to receive the income of a portion of the estate of Jane H. Sherman, deceased, under the provisions of her will, during the term of his natural life. Under instructions from the

Commissioner of Internal Revenue, the present value of his life estate was estimated as of the sum of \$398,623, and the tax thereupon was assessed at the sum of \$8,969.02. This sum was by the executor deducted from the income payable to the plaintiff, and paid over to the Collector of Internal Revenue. This tax has gone into the Treasury of the United States, and the claim of the plaintiff in error is, that it having been unlawfully taken from him, and the United States having received the fund with full knowledge of the source from which it came, is liable in an action as for money had and received, to judgment for the full amount.

The general principle which underlies a right of recovery in such a case was established by this Court in the case of *Duncan v. Jaudon*, 15 Wall. 165.

The authority to sue the United States in this action is found in the provisions of the Act of Congress commonly known as the "Tucker Act," and being Chapter 359 of the Second Session of the Fifty-ninth Congress, passed March 3, 1887 (1 Supp. R. S. 559.)

This action was commenced by petition filed in the office of the Clerk for the Northern District of the State of New York, being the district in which the petitioner resided, and by service upon the District Attorney and Attorney-General, in manner prescribed by the statute. The United States Attorney for the Northern District of New York, duly appeared for the defendant in error, and served a demurrer to the petition, in due form of law, setting up that the petition did not state facts sufficient to constitute a cause of action. Upon presentation of the issues to the Court, the demurrer was sustained.

and upon the order of the Court judgment was duly entered sustaining the demurrer, and dismissing the petition with costs.

Thereupon the petitioner sued out his writ of error, and has brought the case to this Court, where he makes the following

ASSIGNMENT OF ERRORS.

Now comes George D. Sherman, by his Counsel, and respectfully represents that he feels himself to be aggrieved by the proceedings and judgment of the Circuit Court of the United States for the Northern District of New York, in the Second Judicial District, in the above entitled cause, and assigns error thereto as follows:

1. The Court erred in sustaining the demurrer and dismissing the appeal of the plaintiff in error herein.

2. The Court erred in refusing to find, as was claimed by the plaintiff in error, that the imposition of the tax described in the complaint against the plaintiff in error, because of his ownership as executor of the last will and testament of Jane H. Sherman, deceased, of the property mentioned in the complaint, was unconstitutional, unlawful and void.

3. The Court erred in not deciding that the imposition and collection of said tax deprived this deponent of his property, and the estate represented by him of its property, without due process of law.

4. Such Circuit Court erred in refusing to find that the law imposing said tax is not uniform, and does not

afford equal protection of the laws to persons throughout the United States.

5. The said Circuit Court erred in refusing to find that the law imposing said tax denied and does deny to persons throughout the United States, and within its jurisdiction, the equal protection of the laws.

6. The Court erred in refusing to find that the law under which said tax was imposed, denies to the plaintiff in error the equal protection of the laws.

7. The Court erred in refusing to find that the tax so imposed is a direct tax, and is void because not apportioned among the States, in proportion to their population, and in accordance with the provisions of the constitution of the United States.

8. The said Court erred in refusing to find that if said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the constitution of the United States.

9. The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York.

10. The Court erred in refusing to find that in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had not right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover

back from the defendant in error in this action, the amount of the tax mentioned in his petition, and which was assessed against the plaintiff in error, because of his ownership as executor as aforesaid of such bonds of the government of the United States.

11. The Court erred in refusing to find that it is not within the province of the constitutional powers of the United States, or of the Congress, to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the state of New York, or to create classes which may be lawfully regarded in the imposition of taxes, or to make distinction between classes by whom taxes must be paid, or upon whom taxes may be imposed, or to recognize for the purposes of taxation any classes that may have been created by the state of New York; or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is a gift of a testator of smaller means.

12. Because the said act is in other respects unconstitutional and void.

13. The Court erred in that it refused to find that because of the matters set forth in the petition, the plaintiff in error should have and recover of the United States the sum of \$8,969.02, together with interest thereon, from the time of filing his petition, besides the costs of this proceeding.

It is believed that no question strictly technical will be brought to the attention of the Court upon the argu-

ment of these cases. The question which it is desired to have decided by the Court is as to the constitutionality of the clauses above referred to of the War Revenue Tax Law.

The position taken by the plaintiffs in error is:

First. That the tax sought to be imposed is a direct tax, and therefore void, because not apportioned in accordance with the provisions of the constitution.

Second. If the tax in question be not void, because a direct tax and not properly apportioned, it must be classified as a duty, impost or excise, and void, because not uniform, as required by the provisions of the constitution.

Third. It is beyond the power of Congress to create laws of inheritance, or to impose a tax upon a right of inheritance created by the statutes of different states.

Fourth. It is beyond the province of Congress to make a distinction of classes in the imposition of taxes, duties, imposts or excises, and in like manner it is beyond its power to make discrimination amongst classes that may have been created by the different states.

Fifth. In so far as the estate of Mrs. Sherman consisted of government bonds, Congress had not power or authority to impose a tax either upon the *corpus* of the estate, or the income derived therefrom, or upon a transfer or inheritance thereof, or right of succession thereto.

ARGUMENT.

It would be exceedingly presumptuous in any person, however learned, to undertake to place a construction upon the provisions of the constitution, which would ignore the decisions of this Court which have from time to time been handed down, giving meaning and construction to the different clauses of the constitution of the United States, pertinent to the subject of taxation. Nevertheless, if all that has been said by the Courts could for the present be disregarded, and an argument made with reference to the true construction of the provisions of the constitution, aided only by previous and contemporary history, by judicial decisions in other cases explaining the use of language, and by considerations of the use of language as interpreted by the dictionaries, lexicons and decisions of courts, and by common use, without assistance from interpretations given by participants in the conventions which framed the different articles which make our constitution, it is barely possible that a very different construction would be placed upon the different clauses relating to taxation, than now seems to obtain.

When the different colonies, which afterwards became the United States, first federated together, there was necessarily a question about some provision for the expenses of carrying out the objects of the general confederation. The same meaning is implied by the words in common use, "expenses of government."

Under the confederation, in 1778, the expenses of

common defense and general welfare were provided for by article 8 of "the articles of confederation and perpetual union" between the different states. This reads as follows:

"Art. 8. All charges of war, and all other expenses that shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated, according to such mode as the United States in Congress assembled shall from time to time direct and appoint.

"The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several states, within the time agreed upon by the United States in Congress assembled."

If the loyalty of citizens had been universal and had equalled that of their representatives, this clause might have been, and probably would have been, all sufficient. It occurred, however, in actual practice, that there was extreme difficulty in collecting a fund sufficient to provide for the expenses of the confederation, under the article that has been quoted above. Therefore, it occurred in 1785 that so much of the eighth of the "articles of confederation and perpetual union between the thirteen states of America" as is contained in the language quoted above, was changed so as to read as follows:

“That all charges of war, and all other expenses that have been or shall be incurred for the common defense or general welfare, and allowed by the United States in Congress assembled, except so far as shall be otherwise provided for, shall be defrayed out of a common treasury, which shall be supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each state.”

Our general knowledge of the history of the times instructs us, and it is apparent from the reading of the provisions of the articles of confederation above quoted, that there was no completed and detailed method of general taxation which was a subject of consideration by the confederated states and brought in their convention to a final determination and put into form as a consummated plan.

There was, of course, the question of a revenue to be provided for expenses that might be imposed upon the confederated states; and it was apparently the idea of the delegates to the convention which adopted the articles of confederation, that such expenses as must necessarily be incurred to provide for “the common defense and general welfare” should be paid by the different colonies or states upon some basis which would require the payment to be so made that its burden would bear *equally* upon the citizens of all of the states. At the time these delegates from the different states met in

convention, that is in 1778, the main foundation of wealth was land. There was commerce, and there were manufactures, but apparently, and thus our reading from history instructs us, the main reliance of the people of the confederated states was upon the land which was occupied by individuals. Industrial pursuits were mainly agricultural.

The statistics of the census of the United States, as published in the latest record, show that at the time of the adoption of these articles of confederation, but a fraction above three per cent. of the population of what are now the United States, was urban. More than ninety-six per cent of the residents of this country lived upon agricultural lands or in small villages. Therefore, it is not strange that, when there was question of inter-colonial taxation,—for the purposes of equalization,—resort was had to rules and limitations based upon an apportionment of land holdings.

For some reason or other, the plan which was adopted in 1778 did not prove satisfactory. In some of the reports it is said that there was difficulty about collecting taxes upon the plan provided for in these articles of confederation. At all events, whatever may have been the defect in the system that was provided for in 1778, and whatever difficulties may have arisen from attempts to make collections under the agreement of the confederated states, as embodied in the articles of confederation of 1778, it was deemed advisable to provide that the revenue of the confederated government should be derived from an assessment imposed in some different way from

that which was provided for by the articles of confederation of 1778.

As a result, the above quoted provision of the amendment of 1785 was enacted. This made provision that the assessment of taxation thereunder should be in proportion to population, instead of in proportion to the valuation of landed property.

To make a brief review up to this time, we have this situation :

Thirteen colonies or states confederated together in rebellion or revolution. Each one of the states or colonies claimed to be independent,—unless dependence upon Great Britain could be enforced—and the object of the confederation was, to throw off all allegiance to the mother country.

It became necessary to provide a common fund for the common defense, and for the general welfare of all the states or colonies thus confederated.

It was agreed that there was a necessity for such a common fund. The question of how provision should be made to supply the common treasury was a question of political economy, which required the exercise of utmost ingenuity.

At first, it was deemed just, expedient and wise, that the common treasury, from which should be furnished funds for the charges of war and other expenses incurred for the common defense and general welfare, should be supplied and filled up by the several states by payments in proportion to the value of all land within each state.

At the present time, if there be considered the agricultural pursuits of the people of that day, no one can say that the provision ought to have been rejected as unwise. Nevertheless the result was that the plan proposed did not work well.

A few years later it became the fundamental law of the confederation, that all charges of war, and all other expenses incurred for the common defense or general welfare, should be defrayed out of the common treasury, to be supplied by the several states in proportion to their population.

When the method of determining the population became a subject of consideration, it was further provided that every free white man, woman and child should count one, and each slave count three-fifths of one, and Indians, not paying taxes, should count nothing.

It is at present difficult to determine whether the later method of taxation proved more satisfactory than the one which had preceded it, and which was based upon a valuation of real estate. It is sufficient, for the purposes of the questions now under consideration, to know that the later method of assessment and taxation was the one which became embodied in the constitution of the United States, when the articles of confederation gave way to the new constitution.

When it became necessary, for other reasons, as well as for matters of taxation, that there should be a more perfect union between the states, and different provisions were required to be instituted for the common welfare, the constitution of the United States was framed.

This was, as matter of course, made with reference to the then existing situation of affairs, with such enlightenment as was held by the representatives of the people in the convention which framed that constitution, obtained by them from their knowledge of the existing state of affairs, not only at home, but in the whole world, and from their observation of the effect of such articles of confederation. From their solid judgment, based upon their knowledge of present and past, and their hopes for the future, the delegates framed the constitution.

It then was, as it now is, apparent that there was a necessity to provide for a treasury, from which the expenses incidental to the general government could be paid. As has been truly and well said by Mr. Chief Justice Fuller, in *Pollock v. Farmers Loan & Trust Company* (157 U.S.429), at page 561, there was a great change in the condition of things when the articles of confederation were superseded by the constitution. The constitution "gave the power to tax, both directly and "indirectly, to the national government, and, subject to "the one prohibition of any tax upon exports and to the "conditions of uniformity in respect to indirect and of "proportion in respect to direct taxes, the power was "given without express reservation. On the other hand, "no power to tax exports, or imports except for a single "purpose and to an insignificant extent, or to lay any "duty on tonnage, was permitted to the States."

Nothing can be clearer than the language used by the Chief Justice, in referring to the distinction made by the constitution, between direct and indirect taxes. At

the same time, the question still remained as to what are direct taxes, and what are indirect taxes. Mr. Justice Paterson, in *Hylton v. The United States*, 3 Dallas, 171-177, uses this language:

"I never entertained a doubt that the principal, I will not say only, objects that the framers of the constitution contemplated as falling within the rule of apportionment, were a capitation tax, and a tax on land."

It is altogether probable, that in framing the constitution, the delegates to the convention had largely in mind the experience of the colonies, in the matter of the collection of taxes under the articles of confederation.

There had been tried two methods for raising money from the colonies, to replenish the public treasury. One of these had been by a land tax, levying an assessment upon the different colonies or states, and making the apportionment according to the value of lands within the different states.

The other plan, and which was adopted as an improvement upon the former, and which superseded the former, was by a capitation, or by tax upon the different states, which should be apportioned according to the population of the different states. When the question of population was considered there came in the factor of slaves, and the status of slaves was recognized to the extent of counting each slave as three-fifths of a person. Indians not taxed counted nothing.

It was undoubtedly intended by the constitution, to provide that the states under that constitution, should

have absolute and unlimited power of taxation, except only as provided by the constitution itself.

There are three separate provisions of the constitution, bearing upon the subject of taxation. The first is clause 3 of section 2 of article 1, which provides that direct taxes shall be apportioned among the several states included within the Union, according to their respective numbers.

As an incidental commentary upon the inaccuracy of the use of language, as used in the Constitution, it is not uninteresting to call attention to the use of the words "according to their respective numbers." These words can, grammatically, refer only to the States, and not to the population of the States, although a rule is given for determining the respective numbers, by the clause immediately following, which provides that they shall be determined by adding to the whole number of free persons, excluding Indians, three-fifths of all other persons.

It seems almost certain that this clause of the constitution was enacted with special reference to the state of affairs that pre-existed under the articles of confederation. It did not undertake to define what direct taxes were, but it manifestly referred to such taxes as the confederated states had been accustomed and authorized to levy and collect, and provided for the apportionment of such taxes among the different states. There was not here any authority for the collection of any taxes whatever, but a provision as to the manner in which taxes, when *directly* imposed upon the states, or the people of the states, should be apportioned.

The next provision with reference to taxation is clause 1 of section 8 of the same article 1. This defines the taxing power, and names the branch of government by which the power is to be exercised. The provision is

that Congress shall have power: *"To lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."*

The first sentence of this provision gives to the congress absolute and unlimited power of taxation, to the extent that revenue may be required "to pay debts," etc.

[NOTE.—There is no place here for a discussion about punctuation, or whether the pause after "excises" should be a comma or semi-colon, or whether the power to "lay and collect taxes, duties, imposts and excises" is limited by the following clauses to such as may be necessary to pay the debts and provide for the common defense and general welfare of the United States.]

Use is made of the words "taxes, duties, imposts and excises." The second sentence of the same section makes no reference to the use in the preceding sentence of the word "taxes." In it is provided that "all duties, imposts and excises shall be uniform throughout the United States." Evidently the word "taxes" was omitted from this clause, because it had reference to the direct taxes which had been mentioned under clause 2 of section 2, and for the apportionment of which a rule had been there provided.

The third clause with reference to taxation, is the fourth clause of section 9 of the same article 1, which is as follows: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

This last clause was not intended to confer any power whatever, or to establish any rule by which the levying

or collecting of taxes should be governed, except that it provided that for the purpose of ascertaining the population of different states by which the apportionment of direct taxes should be governed, resort should be had solely and only to the census which the constitution provided should be taken within three years after its adoption, and thereafter once in every ten years. This clause may be paraphrased by saying "the census or "enumeration hereinbefore directed to be taken, shall "be the sole rule for determining population, for the purpose of the imposition of capitation or other direct "tax."

Clause 5 of this same section 9 is merely a prohibition upon the powers of Congress with reference to taxation in that it says that "no tax or duty shall be laid on articles exported from any State."

Although this Court has spent much time and erudition in its endeavors to interpret the clauses of the constitution above referred to, and especially in endeavoring to ascertain what was in the minds of the delegates to the convention which framed the constitution, when enacting the clauses above referred to, it would seem as if it ought to be conceded that the convention was not altogether accurate in its use of language, and the members of the convention had not the clearest ideas of the distinctions that might have been made between the different classes of taxes for the collection of which they were making provision. It is probable that the use of the word "taxes" was intended to be applicable to those direct taxes which had been or theretofore could have been imposed under the articles of confederation.

It was intended that there should be a new and practically unlimited power of taxation, sufficient to cover every form of taxation not previously provided for. In its generic sense, no word could be used synonymous with anything applicable to taxation, more inclusive, than the word "impost." It means any tax that is imposed upon any person or thing. The word "duty" is almost equally as broad, while the word "excise" naturally has a more limited signification. In common use, in legislative use, and technically, these words have a somewhat restricted meaning, which this Court and general usage define by contradistinction to direct taxes, but at the same time, by a somewhat confused and bewildering definition, as "indirect."

Whatever legal and constitutional distinction there may be between direct and capitation taxes upon the one hand, and indirect taxes, or imposts, duties and excises upon the other, there is one underlying principle which is the basis of each and all methods of taxation. That principle is that the taxes shall be so apportioned as to do justice *equally* between parties that are subject to the payment of the tax. Under the articles of confederation, an attempt had been made to collect revenue for the government, by imposing a tax upon lands. This was abandoned either because, as has been suggested in some cases, there was difficulty in collecting the taxes, or because it was supposed to work inequality, and justice required a more equitable method of apportionment. Whatever the reason, the change took place, and the new system, which was introduced in 1785, was the plan

which commended itself to the people at large at the time of the adoption of the constitution.

Already, at that time, discriminating legislation was being sought, because of questions that arose from the holding of slaves. In many states, the slave population constituted a very large proportion of the whole population, while in other states an effort was being made slowly and gradually to abolish slavery, and in one state at least, this object had been accomplished. A question of apportionment, whether of representatives or of taxation, upon a basis of population, necessarily had to take into consideration the slaves held in each state, unless the slave-holding power would consent to property in slaves being regarded merely as property in merchandise. This, of course, could not be expected, while slave-holding states desired to have representation based upon a population, and were prepared to advance plausible arguments to demonstrate that slaves were human beings, constituting a part of the population.

Immediately, however, upon such a contention being made, the counter proposition, not unnaturally, was presented, that if the slaves were to be regarded as constituting an element of population, they must be counted for purposes of taxation. The compromise resulted that both for purposes of representation and taxation, each slave should be counted three-fifths of a unit. Thus the question of direct taxation was considered as settled upon a basis of equality.

The same attempt to reach equality was made, when it was provided that the general government should have power to collect duties, imposts and excises. So far as

direct taxation goes, equality had been provided for by a provision which either represented the views of the members of the convention framing the constitution, as securing equality, or was a compromise measure, accepted, as representing equality.

Dealing with the question of indirect taxation, as expressed by the words, "duties, imposts and excises," apparently was not regarded as a difficult matter. It was only necessary to make a general declaration that there should be an equality in the imposition of these indirect taxes. That equality, apparently, could be secured by a declaration that the taxes so imposed should be uniform. At all events, it seems to have so occurred to the members of the convention framing the constitution.

The clause with reference to indirect taxes, requiring that they should be uniform, undoubtedly would have been satisfactory to the members of the convention, if applied to the question of direct taxes, there had not been the danger of misconstruction or difficulty of application, when direct taxes alone should be involved.

To illustrate, supposing the constitution had provided, that direct taxes shall be equal and uniform throughout the United States, or in all the states, it is not difficult to imagine what a broad field for litigation would have been left open, before it could be determined what direct taxes were uniform. The question that has been above adverted to of slave population, would have been a more fruitful ground for discussion than it already has been in the history of this country. The question of uniformity would have involved the question of valuation of real and personal

property, as well as the question of population, and, indeed, it would seem as if human ingenuity, developed and trained by education in law schools, and experience in practice at the bar, would have found an inexhaustible field of industry, in determining the meaning of such a clause, if it had been so used.

At the same time, the application of the words to such indirect taxes as were within the contemplation of the framers of the constitution appears to be exceedingly simple. To illustrate how simple, it may be sufficient merely to call attention to an incident which this Court recognized as matter of history in giving its decision in the Pollock case. It appears that when the draft of clause 1 of section 8 of article 1 of the constitution was about to be finally adopted, it was referred to the committee on style. As originally prepared it read, that all duties, imposts and excises should be "equal and uniform" throughout the United States. The committee on style struck out the word "equal" as mere tautology, and so reported. It was the position of the committee, and that adopted by the convention, that if the indirect taxes were made uniform, of necessity they must be equal.

This has been thus referred to, to direct the attention of the Court specifically to what must be perfectly familiar to every member of the Court, and that is, that the one fundamental idea underlying the constitutional restrictions upon legislation that should impose taxation was, that there should be *uniformity* or *equality* in all taxation. Such equality was to be secured by making the tax imposed uniform. In principle, there was

no difference between direct and indirect taxes—in application of methods there was a divergency.

For the purposes of the present case, it seems to be of comparatively little moment, whether the tax in question be regarded as a direct tax or capitation, or whether it is to be classified as a duty, impost or excise. If a direct tax, it certainly is unconstitutional, because not apportioned among the several states according to their respective numbers. If a duty, impost or excise, it is not uniform.

DIRECT TAXATION.

While contending that in either event the tax is unconstitutional, it is difficult to understand how, in view of the decisions of this Court, it can be construed as any other than a direct tax. For the purpose of a judicial construction of the present act, it does not seem to be necessary to go back of the decision of this Court in the Pollock case.

In *Pollock v. Farmers Loan & Trust Company* (157 U. S. 429, 558), the learned Chief Justice says this:

“Ordinarily all taxes paid primarily by persons who “can shift the burden upon some one else, or who are “under no legal compulsion to pay them, are considered “indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of “the income yielded by such estates, and the payment of “which cannot be avoided, are direct taxes.”

In presenting a brief to this Court upon the questions

involved, it is, of course, unnecessary for counsel to repeat to the Court word for word its decision in a case so recent as the income tax case. At the same time, the words that have just been quoted find so pertinent an application to the language of the statute under consideration, that it seems exceedingly strange that some of the distinguished lawyers in the Senate or House of Representatives should not have marked the incongruity of attempting to enact a statute so clearly prohibited by the constitution, and so recently interpreted by this Court.

Nothing can be plainer than the language of Mr. Chief Justice Fuller (and it is as indisputable as it is plain):

"BUT A TAX UPON PROPERTY HOLDERS IN RESPECT OF
"THEIR ESTATES, WHETHER REAL OR PERSONAL, OR OF
"THE INCOME YIELDED BY SUCH ESTATES, AND THE PAY-
"MENT OF WHICH CANNOT BE AVOIDED, ARE DIRECT
"TAXES."

Other counsel, opposed to the government upon this question, have so fully and exhaustively examined the cases which have been decided in this Court upon the question of direct taxation, that it would be in the line of plagiarism to repeat their arguments in new language, and no aid would be afforded to the Court, by repeating what has been so well said by them, or by again citing authorities referred to by them. For the purposes of the present argument, it is considered that the question of what constitutes a direct tax was fully decided by this Court in the Pollock case, in so far as any questions

now before the Court may be the subject of decision. The citation of other cases seems almost like expressing a doubt as to the integrity of that decision.

Even with this disclaimer, it is not impertinent to consider the language of Mr. Justice Paterson in the *Hylton* case (3 Dal. 176):

“What are direct taxes within the meaning of the constitution? The constitution declares that a capitation tax is a direct tax; and both in theory and practice, a tax on land is deemed to be a direct tax.”

In the Act of 1898, Congress apparently sought to avoid the imposition of the present tax, as a direct tax, by not including real estate within its provisions. It went, however, to the other extreme of making it a capitation tax, for the tax is not imposed upon any subjects of duty, impost or excises, but is made directly against individuals or certain classes of individuals.

The situation is not relieved at all by provisions which enable the persons declared subject to the tax to recoup from the funds in their hands. There are few taxes, except those that are paid by the final consumer of an article, which cannot in some way be passed on to another. A tax upon real estate that is held for the purposes of a tenement, will be added to the rent exacted by the landlord, and so paid by the tenant. So with most other taxes.

In this case, the tax is imposed upon a trustee, and he is instructed that he may recover the tax from the trust estate. *The tax is a direct tax imposed upon him.* If this be not so,—if the fact that he may make legatees pay the tax, relieves the situation from the imputation

that it is a direct tax imposed upon the executor, the beneficiary whose legacy is made the subject of the tax, is taxed in his individual person, because of something which he has or receives. The tax is upon him. That such is the fact cannot be varied by any claim or pretence that the tax is upon his right of inheritance. His right of inheritance is but an item of property like other properties that he may own.

Nearly all taxes that are imposed upon individuals are imposed upon them with reference to the property that is possessed by them. Right of inheritance is an item of property, and property that comes by inheritance is not different from other property of the same species. A poll tax of one dollar per head imposed upon the privilege of voting, or upon immunity from service in the militia, is capitation, which is uniform, and probably was under consideration by the convention which framed the constitution. A tax imposed upon individuals in proportion to their wealth, is strictly a capitation, although it is liable to be regarded as a tax upon property.

There seems to have been always a distinction between the taxation of personal and real property, which rests to some extent upon a fiction of law with reference to the *situs* of the property. Real estate is in many or perhaps most states taxed as such, one reason for which is, that it is immovable. A tax is not imposed upon personal property, but is imposed upon the holder of personal property, because the possession of that personal property is presumed to accom-

pany its holder wherever he may be. The tax upon land is upon all sides conceded to be a direct tax. The tax upon an individual for his right to vote, or his right to citizenship, ordinarily called a capitation or poll tax, is unquestionably a direct tax. Is the tax any less direct which is imposed upon an individual because of his holding or owning property, whether real or personal? In the *Hylton* case, it was held that a tax on carriages was not a direct tax. Would the same be held, if the law had read, "Every person who owns a carriage shall be 'subject to a tax?'" If so, then it must be held that a tax upon individuals is not a direct tax.

A tax upon individuals would be conceded to be a direct tax if all individuals were assessed equally. A tax does not become direct or indirect merely because it is equal or unequal. It must be direct if directly imposed upon a person.

This law, now being considered, says (Section 29), that "any person or persons having in charge or trust, as "administrators, executors or trustees, any legacies or "distributive shares arising from personal property " * * * shall be, and hereby are, made subject to "a duty or tax, to be paid to the United States as follows, that is to say:"

It seems utterly impossible to conceive of language which could be more explicitly used, for the imposition of a direct tax, than is found in these words. The tax is imposed directly upon administrators, executors or trustees, or rather, to be more accurate, it is imposed *upon such persons as are administrators, executors or trustees*. As Mr. Chief Justice Fuller says in the

words above quoted, the tax is imposed upon them "*in respect of their estates,*" and the tax is one "*the payment of which cannot be avoided.*" Therefore it is a direct tax.

This reasoning cannot be avoided by saying that the person upon whom the tax is thus directly imposed occupies a representative position, and the tax is imposed upon him merely in his representative capacity, nor by saying that the tax is not upon him, but upon the property which he has in his possession, and holds in trust. It makes no difference in determining the question whether the tax is indirect or direct, whether the property is in trust, or owned absolutely by the party assessed. The tax is imposed upon the individual himself. Mr. Murdock is the party who is "made subject to a duty or tax."

There are other provisions that concern the method in which the tax shall be collected, but none of them modify or change in any way, shape or manner, the fact that the person who is executor is made subject to the duty or tax. Section 30 undoubtedly provides that the tax or duty "shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid and discharged by the United States." It also undoubtedly speaks of: "The duty or tax assessed upon such legacy or distributive share." It also provides that proceedings may be had for the collection of the tax, from the estate of a decedent who may be represented by the executor. At the same time, the law provides for direct proceedings against the party

assessed, if he have custody or possession of the property of the decedent, and makes him personally liable to penalties, in case he refuses to give all such information as shall be necessary to enable the government to determine the amount of the tax imposed. Whatever the other provisions of the statute may be, they do not in any way modify or change the effect of the opening sentence of section 29, which says in so many words that the person having in charge as executor, any legacy or distributive share arising from personal property, shall be subject to a duty or tax to be paid to the United States. It is the individual, it is the person, that is made subject to the tax, and no language could be used which under any construction would more effectually create a direct tax, than the words which are used in this section.

INDIRECT TAXATION.

Supposing, however, that the court should be of opinion that this tax is not a direct tax, and that it comes under the head of duty, impost or excise, the argument against its constitutionality is none the less strong, for if duty, impost or excise, there is a constitutional requirement that such taxes shall be uniform throughout the United States.

The language of the constitution is "but all duties, "imposts and excises shall be uniform throughout the "United States."

The question of lack of uniformity seems to be so one-sided, that the incongruous provisions of the statute must require a decision against its validity, unless it shall be saved by some construction that may be put upon the words "throughout the United States."

Where the question has not been directly involved, and when careless reference has been made to this use of language, it may appear to have been considered in some of the cases in this Court that this requirement of the constitution is fully met, if a statute imposing a duty, impost or excise operates *territorially* in a uniform manner. By others it has been left open to the doubt expressed by Mr. Justice Peckham in *Nichol v. Ames* (173 U. S. 509, 521), "whether the word 'uniform' is to be understood in what has been termed its 'geographical' sense."

Careful consideration of the question, however, must lead to the conclusion that the word "uniform" is not restricted to a geographical definition. Let it be supposed that the words "throughout the United States" had been stricken out, by the committee on style, and the recommendation of that committee had been adopted by the convention. It is hardly conceivable that this Court would have held, that the meaning of the clause now under consideration would have been either enlarged or restricted by the omission of these words. As they now remain, we have as much right to regard them as superfluous, as the committee on style had to regard the word "equal" as tautological with "uniform." Leaving out the words could not give the government of the United States jurisdiction of questions of taxation, be-

yond the limits of its own territory. Making use of the words, as they have been written, does not restrict the territorial limits within which the constitution has application. Neither can any rational use of language lead to the construction that the words "throughout the United States" were intended to be or are at all synonymous with the words "territorial," or "geographical."

The cases in which this question has been largely discussed have arisen mainly upon matters of customs, where, for instance, it was contended that the law which could only be imposed upon a seacoast was prohibited by this language of the constitution, because it could have no application whatever to an inland state. Other instances are cases where the law would apply to the products of a state, which, because of variation of climate, could not be grown in other states.

No decision based upon such contentions as these can have application to such a question as is here presented. It cannot be disputed that the law here in question applies with the same force and effect in Maine as in California. Territorially, it is uniform. But it is absurd to contend that the provisions of the constitution can be fully met and complied with by imposing a tax that shall be territorially uniform, but unequal in every other respect. For instance, suppose the law which is at present under consideration, had said that every person having in charge as executor any personal property, shall be subject to a tax in following form, that is to say: if his name commences with A he shall be subject to a tax of one per cent. ; if his name commences with B he shall be subject to a tax of two per cent. ; if his name

commences with C he shall be subject to a tax of three per cent. ; and so on through half the alphabet ; and then, let there follow a provision that if his name commences with any other letter of the alphabet, he shall not be subject to any tax at all.

It cannot be possible that such a statute would be upheld as constitutional. If held to be unconstitutional, it would be because of its violation of the provision at present under consideration, or of some other provisions which are equally applicable to the present law, or because of its being so unequal as to be subversive of the basic principles of the establishment of the government itself.

Whatever reason might be assigned for withholding the support of the constitution to such a law, it could not be met and overcome by the argument that this provision of the constitution requires only territorial uniformity, and is not violated, provided the law is the same in all the states and territories.

Assuming that it be established that the question of uniformity is not a mere question of territorial uniformity, it *may be* incumbent upon the assailants of the validity of this law to demonstrate that it is not uniform.

This ought not to be difficult. At the same time, it is something that can hardly be established by arguments based solely upon precedent in this Court, for there can be few precedents to aid in the construction of a statute which is so absolutely unprecedented as is the present law. There have been laws of Congress, and laws of different states, which have imposed a different ratio of taxes

upon different estates, because of their greater or less valuations. It is unnecessary to consider now the validity of any such laws. It is believed that this is the first law that was ever enacted, of this or of any other country, which made the amount of a tax to an individual dependent upon the wealth of the donor of a legacy. It is equally certain that this must be the first law which has ever been enacted by a civilized nation, which made the ratio of taxation upon the estate of a decedent to depend upon the value of the assets which he held in his possession at the time of his death, irrespective of the debts which he might owe, and of the claims of creditors to take his estate from him.

Unfortunately, it is not the first statute that has ever imposed prohibitive duties upon a man's attempts to make charitable distribution of his estate. It is none the less to be condemned because of precedents that are for like reasons more or less obnoxious.

The Court will note that this tax is imposed, not with reference to the clear value of the estate held in trust after payment of debts, but the executor is made subject to a duty or tax, where the amount of personal property passing into his charge exceeds \$10,000, the duties varying thereafter, according to the amount of the estate which passes into his hands, not according to the amount of legacy or distributive share which passes to a legatee, beneficiary or next of kin. Thus, if the estate be between \$10,000 and \$25,000, the tax is at the rate of seventy-five cents on each one hundred dollars, when the beneficial interest passes to lineal issue, or lineal ancestor, brother or sister of the person who

died possessed of such property. If the party entitled to such beneficial interest is related in more remote degree, the executor has to pay a greater tax, until, if it pass to a remote relative, or to a stranger in blood, or to a body politic or corporate, the executor shall pay at the rate of \$5 for each \$100 of clear value of the interest given. If the estate exceeds \$25,000, but does not exceed \$100,000, the rates of duty or tax shall be more by one and one-half, and where the amount of value of the exceed the sum of \$500,000, the rates of duty shall be more by two, and where the amount of value of the property shall exceed the sum of \$500,000, but not \$1,000,000, such rates shall be more by two and one-half, and where the amount and value of said property shall exceed the sum of one million dollars, such rates or duty shall be more by three.

That the construction that is put by counsel upon the language of this act, in saying that the tax depends upon the amount of property that passes into the hands of the executor or trustee, regardless of the claims of creditors upon that property, is correct, appears from the language of the act itself, and is in harmony with the ruling of the Treasury Department. The Treasury Department Ruling, No. 20,461, on the subject of legacy taxes, is as follows:

“(20,461.)

“LEGACY TAXES.

“Washington, D. C., December 23, 1898.

“Sir—This office is in receipt of a letter from Smith & Weatherly, attorneys in your city, under date of October 24 (who have to-day been referred to you), asking

certain questions relative to legacy tax. In reply, you will please inform them as follows:

"The whole amount of personal property, before deducting debts, expenses, or shares to widow or husband, determines the rate of taxation. The tax on legacies should be deducted from the individual legacies, but is a lien upon the entire property of the decedent. The only legacies or distributive shares exempt are those passing to the widow or husband.

"If an estate valued at \$188,000 had \$100,000 debts charged against it, thus reducing the amount subject to distribution to less than \$100,000, the tax on the legacies must be paid as of an estate exceeding \$100,000 in value and not exceeding \$500,000."

To make illustration of the workings of this law, it is not necessary to go outside of the cases that are before the Court, and such hypothetical cases as may be suggested by the very language of the statute itself.

Supposing Mrs. Sherman had died, leaving not to exceed \$10,000, the government would have none of it, whether it went to her children, to her creditors, or to the different charities she undertook to provide for. If she had left \$11,000 of principal and a thousand dollars of debts, a tax would have been imposed which, while a direct tax upon the executor, would ultimately have been indirectly a tax upon each of the beneficiaries of Mrs. Sherman, although they did not receive one cent more from her estate than they would have received if she had taken the pains to pay the thousand dollars of debts in her lifetime, instead of leaving those debts to her executors to pay. If she had left exceeding ten thousand dollars, and not exceeding twenty-five thousand dollars,

those who were her beneficiaries would have been subject to a tax proportioned to the amount of her wealth, and not solely based upon the amount of the legacies.

The fact is, her estate exceeded one million dollars, and became subject to the highest rate of duties. Consider the case of the Sherman Collegiate Institute, or of the Saratoga Hospital. Mrs. Sherman, during her lifetime, had cared for these institutions. She undertook, by her will, to give to the Collegiate Institute \$20,000, and to the Hospital \$5,000. Had her whole estate not exceeded \$25,000, she might have accomplished this end, without imposing upon these charitable institutions a greater tax in favor of the government than five per cent., but, unfortunately for them, she was worth more than a million of dollars, so the government takes fifteen per cent. in each case, and her twenty thousand dollar bequest to the Collegiate Institute is immediately reduced by the government to \$17,000, and her bequest of \$5,000 to the Saratoga Hospital cannot be paid until there has been deducted from it \$750.

The power of the government to impose taxes upon these legacies in some form or other is not now the subject of question. It is, however, confidently asserted that the tax is not uniform, which says that the Sherman Collegiate Institute cannot take a legacy of \$20,000 from a party that is worth upwards of a million dollars, unless it pays three thousand dollars, while it may take such a legacy from a party that is worth more than \$100,000, but not to exceed \$500,000, upon payment of ten per cent. or two thousand dollars, and may take its whole twenty thousand dollars from a party that is worth less

than \$25,000, upon payment of a tax of one thousand dollars, and may accept without payment of one cent of duty, the whole of a person's estate, provided that estate does not exceed \$10,000.

The lack of uniformity and equality could not be made more apparent in any supposable case. The imposition of the tax is based upon most irrational, inequitable and unjustifiable principles; upon the creation of classes, not recognized by law; upon absolute inequality, and upon the clearest lack of uniformity. Why a hospital may not receive a gift from a millionaire without paying a tax of fifteen per cent, when it could be the recipient of an equal amount of money from a poor man without paying anything, passes all comprehension.

Nevertheless it comes within the provisions of this law which makes a distinction that is outside of the pale of the constitution.

CREATION OF CLASSES.

This tax is unconstitutional and void, because it assumes to create or recognize classes which Congress has no power to create or recognize.

The division of sovereignty between the United States and the separate states is not visionary, but real and marked. Articles IX and X of the constitution, which were added by way of amendment to the work that was done by the original convention, accurately de-

fined what undoubtedly would have been implied had those clauses not been formulated.

The United States represented a government of delegated powers. In the constitution, while there was an enumeration of certain functions bestowed upon the general government, and of certain rights reserved to the people and to the different states, it was nevertheless the understanding that the general government had no rights or powers whatever except such as were expressly delegated to it. Articles IX and X did nothing but make more explicit what had been previously understood.

Article IX is: "The enumeration, in the constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Article X reads: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people."

The right of taxation given to the United States was just as broad as the language of the constitution in which it was given, and no broader. Unlimited right of taxation was reserved to the states, except as restrictions were placed upon that right by the words of the constitution. The right to regulate the descent of property by inheritance was not given to the United States. It was left to each of the states to regulate the question of inheritance, as each state might for itself determine. The right of legislation by each state is not a property right which is the subject of taxation, either direct or indirect. The imposition of a tax upon the right of inheritance, is a limitation upon the power of the state to

create, recognize, or control the right of inheritance. As such a limitation, it is as much subject of criticism as is the attempt by the United States to impose an income tax upon the salaries of state judicial officers.

In *United States v. Perkins* (163 U. S. 625), this Court had under consideration the inheritance tax laws of the state of New York. The Court upheld the power of the state of New York to impose an inheritance tax, and in its decision held that the particular tax under consideration was not a tax upon the property itself, but upon its transmission by will or by descent. In this, however, it but followed the decisions of the state Court, in construing a statute of the state. The opinion of the Court, per Mr. Justice Brown, quoted from the language used by Mr. Chief Justice Taney, in *Gager v. Grima* (8 How. 490, 493), as follows:

"The law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and terms within which property, real and personal, within its dominion may be transferred by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it. * * * If a state may deny the privilege altogether, it follows that when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy."

This recognizes one of the reserved powers of the states, but its very recognition amounts to substantially a denial of the possession of a like power upon the part of the United States.

The Perkins case also decides another point here con-

tended for, namely, that the inheritance tax here complained of, is a limitation upon the power of a testator to bequeath his property. The language of the Court is (p. 628):

“The so-called inheritance tax of the state of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the state has a right to impose.”

This being so, the present inheritance tax law of the United States operates to limit or restrict the power of the Legislatures of the different states, to regulate the descent or transmission, by will, of property within the different states. Such power is not vested in the United States, by any power of taxation that is conferred upon it by the constitution, and the attempt to exercise such power is clearly unconstitutional.

Reference is frequently made to the language of Mr. Chief Justice Marshall, in writing the opinion of this Court, in *McCulloch v. State of Maryland*, 4 Wheat. 316, 431, as follows:

“*That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government a power to control the constitutional measures of another, which other, with respect to these very measures, is declared*

“to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word confidence. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government.”

It is altogether probable that the first sentence of this paragraph has been largely misunderstood, and its true meaning is not to-day fully appreciated. The power to tax “involves” the power to destroy, in so far as the power to tax takes away from the owner his own property. If the whole of a man’s property is taken away for public purposes, it is hardly conceivable that it can be taken, except by virtue of the power of eminent domain (and not by virtue of the power of taxation), in which event recompense will be made to the owner.

If taxation goes to the extent of taking the whole of the property of a citizen, then—under the requirements of the constitution for uniformity of taxation, or for such an apportionment as will produce equality—the destruction which follows taxation will inevitably be the destruction of the whole of the property of the whole country, and that means of the government itself.

Such could hardly have been the meaning of the learned Chief Justice. Yet he was wise in saying that such extremity of taxation would be an abuse, to presume which would banish the confidence which is essential to all government. Inasmuch as the taxpayers constitute the government itself, it is inconceivable that taxation can be carried to the extent of destruction.

The pursuit of this question, however, is liable to lead into the field of metaphysics, and to serve no particular purpose in reaching a determination of the questions before the Court. It is deemed, however, pertinent to refer to this remark of Chief Justice Marshall, because it directs attention, sharply, to the restrictions upon the power of taxation, which stand between the exercise of that power and destruction.

There never will be destruction of property by taxation under the constitution of the United States, because of the limited powers of taxation conferred by the provisions of the constitution. There may not be direct taxation, except upon the same lines of apportionment which regulate representation in Congress. There may not be the levy of duties, imposts or excises, unless they be uniform throughout the United States. It is because of these constitutional provisions and prohibitions, and because the general government has no powers except delegated powers, that it is impossible that taxation in the United States can ever reach to the extent of destruction.

To apply these remarks to the present case, it is in the line of destruction that this law goes outside of the limits of uniformity prescribed by the constitution, and undertakes to establish unequal taxation. Thereby it becomes destructive, and is therefore subject to restraint by this Court.

If a legacy may be subjected to a tax of five per cent. when it comes from a testator worth \$25,000, and subjected to a tax of fifteen per cent. if the testator be worth a million of dollars, then when a testator is worth fifty

millions of dollars, it will be within the power of Congress to say that no hospital, collegiate institute, stranger or next of kin, shall receive a legacy from him, without paying ninety, ninety-five or ninety-nine per cent. As a logical sequence the power to tax must involve, beyond question, the power of destruction. But against such power of destruction, this Court is called upon to intervene and to interpose the protection afforded by the constitution, when it says that such taxes shall be uniform. If it is within the power of Congress to confiscate a portion of the estate of a decedent, because of his death, and because of inheritance from him, the power of Congress must be restricted by those provisions of the constitution, which require the imposition of a tax to be uniform.

POWER TO TAX RIGHT OF INHERITANCE.

The foregoing statement of the views of counsel leads logically to the consideration of the next proposition, which is the *want of power of Congress to impose a tax upon right of inheritance given by a state.*

It is beyond the constitutional powers of Congress to impose a tax upon a right or privilege of inheritance created by the Legislature of a state and solely dependent upon the statutes of a state.

So much has been said upon this proposition in the briefs of other counsel who are united in resisting the

enforcement of the tax in question, that it is not considered necessary to make an elaborate argument upon this point. Reference is made to the briefs of other counsel, as being sufficient to induce the Court to render its decision, in accordance with the propositions sought to be maintained by the plaintiffs in error. What is said, however, under this point, may be considered as in support of the proposition asserted, that the law in question is not uniform in its action.

Aside from the objections that may be made to this act of Congress, because of its imposition of a greater tax upon property that comes from a millionaire than from property which comes from persons of lesser wealth, there is an unjust discrimination against the recipients of an estate left by a decedent. No matter what may be the wealth of a person from whom the estate proceeds, if the recipient of that estate be a husband or wife, the government derives nothing by way of revenue from the estate of the decedent. If the beneficiary of a decedent, whether under a will, or under the state laws of inheritance, be a lineal descendent of the decedent, a tax is imposed upon the estate he receives, varying from seventy-five cents on the one hundred dollars, to two dollars and twenty-five cents, according to the wealth of the decedent. If the beneficiary of the estate be a stranger in blood to the decedent, or a corporation, and the estate of the decedent exceed ten thousand dollars, the tax imposed upon the administrator of the estate—to be deducted from the legacy, or beneficial interest passing to the beneficiary—will vary from five to fifteen per cent.

It is claimed that there is a lack of uniformity in

the imposition of this tax, not only because of the varying amount of the tax, in proportion to the wealth of the benefactor or decedent, but also because in the different states there are different rules and legislative enactments governing the transmission of property of decedents.

This act that is under consideration relates not only to the property of those who die leaving wills, but also of those who die intestate. The portion of an estate of a decedent, which a widow takes in case of intestacy, is not the same in one state that it is in another. In the state of New York a widow will take one-third of the personal estate of her husband, in case of his intestacy, and one-half, with something additional, in case he die leaving no lawful descendants. If he leave no children, but leave brothers and sisters, the widow will take two thousand dollars of his personal property, and one-half of the remainder of his personal property. These provisions are alike, whatever may be the source from which the income is derived. In the State of Ohio the law is very different. In case the husband dies leaving no lawful descendants, and leaving an estate which did not come by descent, devise, or of gift, the whole of it will pass absolutely to the wife.

It would seem as if the statement of the provisions of the law of these two different States, ought to be sufficient to convince this Court, that the law under consideration imposes a tax which is not uniform. In part, its lack of uniformity comes from the fact that the Congress has undertaken to regulate the right of succes-

sion in the different states. The law seems to be, that the different states may give a right of inheritance in cases of intestacy, subject, however, to the provision that the government receive therefrom a certain revenue. When defining what that revenue is to be, the Congress undertakes to say, that it shall be apportioned in accordance with the proximity of blood relationship of the beneficiary to the decedent. It undertakes to make the same rule applicable in cases where distribution of assets comes under the statute, and where it is provided for by will. The rate of taxation is the same in cases of intestacy as it is in cases of testamentary disposition of property. The laws of different states regulating descent of property and distribution of estates vary. This law of Congress, undertaking to recognize the classes that have been created, and may lawfully be recognized in different states, and undertaking to adopt those classes as a basis of disposition, puts itself in antagonism with the constitutional provisions requiring uniformity of taxation.

In the first place, it cannot be conceded that the United States may impose a tax upon an inheritance by a child, and let go free the estate which passes to the widow. In the second place it cannot be conceded that a child of a comparatively poor man, may be made the recipient of a legacy, and subject to the payment of a small tax, while he can not receive a similar legacy from a party as nearly related to him, but wealthier, without paying a greater tax. In the third place the estate may be wholly exempt if the original owner died

intestate in Ohio, but subject to tax if he died intestate in New York.

This brings us up to the consideration of the point, that even if those *dicta* shall be upheld, which say that the only uniformity required in the imposition of duties, imposts and excises is, that the taxes shall be territorially uniform, the lack of uniformity between different states is sufficient to require the Court to declare void the present law..

Without considering the provisions of other states, and considering merely those of the two to which attention has been directed above, viz., Ohio and New York, it appears that in cases of intestacy in the state of New York, if a decedent leave a widow and no child, his widow will take for herself and have one-third to one-half of his personal property. In the state of Ohio, if a man die intestate, leaving a widow and no children, his widow may take the whole of his personal estate.

This law of Congress under consideration, then, is so framed, that in the state of New York the estate of a decedent may be subjected to a tax upon one-half thereof, while in the state of Ohio, the estate may go entirely clear of taxation. This instance is cited in support of the main proposition, that the Congress has not right or power to regulate inheritance or succession to property, in cases of intestacy, or in cases of testamentary disposition, and the recognition of the inheritance laws of the different states necessarily involves considerations which must result in such an interference with the uniformity of taxation required by the fundamental law of the land

as to make the imposition of such a tax as that now in question unconstitutional and void.

As a further illustration there may be cited a true incident, and not a case merely suppositious. Franklin Townsend, of the city of Albany, New York, died since the enactment of the statute in question, leaving an estate of between one and two hundred thousand dollars. In and by his will he gave to a servant in his family the small legacy of fifty dollars. That servant could not receive that legacy without paying to the government ten per cent. of its amount. Her legacy of fifty dollars was reduced to forty-five dollars. Had Mr. Townsend been worth less than ten thousand dollars, this faithful servant would have received the whole of her legacy. Had he been worth more than a million dollars, instead of paying the government five dollars, she would have had to pay it seven dollars and fifty cents. Such a tax is not uniform.

It has happened recently that an eminent citizen of the state of New York died, leaving a fortune estimated at from fifty to one hundred millions of dollars. Such bequests as he gave to charitable societies, hospitals, orphan asylums and strangers in blood, are subject to a tax of fifteen per cent. Such legacies as were left to his lineal descendants are subject to a tax of two and twenty-five one-hundredths per cent. The tax is not uniform, when considered merely with reference to those parties who became recipients of the testator's bounty. If the present law is upheld as constitutional, the lack of uniformity may be extended by further provisions in the exact line of the present enactment. Thus

it may exist that if the decedent leaves more than five millions of dollars, the minimum rate of tax prescribed by the statute shall be multiplied by four. If he shall leave more than five millions of dollars, the minimum rate of taxation shall be multiplied by five, and if he leaves more than fifty millions of dollars, the maximum rate of taxation may be more than twenty times as great as the minimum;—thus making an absolute confiscation of a whole estate. In other words, the power to tax would be carried to the actual extremity of confiscation.

TAXATION OF GOVERNMENT BONDS.

In the *Murdock* and *Sherman* cases it has been made to appear, that a large portion of the estate of the decedent, and at least one-third thereof, was invested in so-called government bonds. These bonds do not require description, and the words used in stating what they are, do not require definition. It is a matter of common history, that the government of the United States has from time to time borrowed money, and to secure repayment of the sums of money borrowed, has issued bonds such as are described in the complaint in the *Murdock* case, and in the petition in the *Sherman* case. These bonds provide that the United States will pay the principal sum specified in them, with interest according to the terms therein mentioned. With reference to such bonds, the Congress has enacted (R. S. Sec. 3701):

“All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation, by or under state or municipal or local authority.”

Of course, this provision of the statute does not make these bonds exempt from taxation, under the authority of the United States. It is not because of this statute that such exemption from taxation is claimed for these bonds. It is, however, claimed that the United States has bound itself, by its solemn agreement, to pay, with interest, the principal sum specified in each one of these bonds, and it is not within the province of the Congress to vary that agreement.

The education of a lawyer oftentimes is very narrowing to his intellect. If the line of cases in which he is called upon for his services involves decisions which are to depend solely upon technical rules for the construction of the language of statutes, his attention will be so diverted to mere hair splitting, that he will be apt to lose sight of the general underlying principles which should control the courts in deciding cases upon principles of justice, where such principles are invoked and should prevail.

In interpreting the constitution of the United States, it is belittling to consider that an interpretation must rest upon a technical use of particular words, without reference to the grand fundamental principles upon which that constitution is based. It has been said, above, that the government of the United States has only delegated powers. In the restrictions that have been placed upon the states in the constitution, it has been provided amongst other things, that no state shall pass a "law impairing the obligation of contracts." It has not been imposed upon the Congress that it shall not

pass a law impairing the obligation of contracts. In the *Legal Tender Cases* (12 Wall. 457, 458), it is expressly decided that the inhibition placed by the constitution upon the states, against acts impairing the obligation of contracts, does not apply to Congress. It has likewise been held in many states, that the different provisions of the constitution, in restraint of the action of the states, do not apply to Congress. All this is well recognized, and the iniquity of conclusions that may be drawn therefrom is only equalled by the stability of the foundation upon which the main proposition rests. The constitution says, that a state shall not pass a law to impair the validity of a contract. It does not say that Congress may not pass such a law. If it be an inference from this that Congress may pass a law impairing the obligation of a contract, and that this is one of the powers delegated to Congress, it is of course, the duty of this Court to uphold the power of the Congress. The constitution says (Art. 14), that no state shall deny to any person within its jurisdiction the equal protection of the laws. If this means that, while a state may not, the Congress may, deny to citizens the equal protection of the laws, it is time that the constitution was changed.

In *Lake Shore Railway Co. v. Smith* (173 U. S. 684), this Court held unconstitutional laws of a state which required a railroad company to sell mileage tickets at a less rate than was fixed for the sale of single trip tickets. The basis of this decision was, that the law created classes, and gave to a person able to buy a thousand miles of travel, privileges which were not accorded to the purchaser of single trip tickets. It was therefore a

violation of that part of the constitution which prohibits states from denying the equal protection of the laws. The constitution does not say in so many words, that Congress shall not deny to persons within its jurisdiction the equal protection of the laws, but it is humbly conceived that this is one of the implied provisions of the constitution, which is a fundamental principle of the government, of the power of which the constitution is descriptive.

It is a negation of power, it is true. At the same time, it would seem that it ought not to require argument to show that it is unnecessary to impose upon the Congress a prohibition of power to be unjust or discriminating.

It ought to be, if it be not, a fundamental principle of our government, whether within the lines of the written constitution or not, that equal and exact justice shall be done to all, and that no discrimination shall be made by Congress, or by virtue of any law of Congress, in favor of one individual as against another. A tax law ought not to discriminate in favor of, or against, a rich man or a poor man, a man with a wife and child, or a bachelor with no family. Certainly, when it comes to the question of a charitable bequest, discrimination ought not to be made against a bequest that comes from a wealthy man, from whom the largest bequests of a charitable nature are to be expected.

When, however, there is to be considered the question of taxation upon government bonds, there is a question that transcends technical rules that may be written to render certain the provision of any law which speaks of acts legislative impairing the obligation of contracts.

Let it be conceded that the Congress has power to pass such laws as shall utterly ignore contracts made between the states and between different parties. So long as it confers upon the courts power to sue the United States, it must leave the courts with full jurisdiction to grant and enforce judgment against the United States, upon such contracts as the nation has made. When the United States, in due form of law, issued to Mrs. Sherman its obligations to pay to her \$500,000, with interest, and put those obligations in the form of negotiable securities, and likewise provided that the courts might be open for the enforcement of claims against the United States, it was put within the power of this Court to render judgment against the United States upon its contract with Mrs. Sherman.

Although the question comes before this Court in form different from that which would occur had she held the bonds until they became due and then had sued upon them, we have the same principles of law and equity to pass upon as if she had filed her petition in the Court of Claims upon the maturity of her bonds, and had asked the aid of the Court in recovering against the United States the sum of money which the government has agreed to pay upon the bonds held by her. Supposing in answer to such a petition, the government had set up an act of Congress, declaring that payment should not be made upon such bonds, until there had been deducted from the face value thereof fifteen per cent. In effect, the claim would have been exactly the same claim that is made by the government in this case.

The beneficiaries under Mrs. Sherman's will, other than her heirs-at-law and next of kin, are prohibited from having the government bonds which are required to pay their legacies, until they part with fifteen per cent. of their value. The government stands in this case, in the position of saying,—we have borrowed your money from you, we have promised to pay one hundred cents on the dollar, with interest, but because you have chosen to part with this obligation,—by taking occasion to make a will and then to die,—we insist upon it that the trustee in whose hands you have placed the bonds for the purpose of their transmission, shall pay to us fifteen per cent. of the face value of the bonds.

In other words, we have agreed to pay, but will not pay, except as we repudiate fifteen per cent. of our obligation to pay.

It is believed this is not the law, and certainly, it is not equity. We are in Court the same as if we came here suing the United States upon its bonds. We are entitled to judgment upon the contract, and it is not within the power of the government to defeat or prevent a judgment or reduce its amount by claiming a recoupment authorized only by its own arbitrary act, whether called an act of taxation, or an act of confiscation, or an act of repudiation. The government has promised to pay so many dollars, and so much interest. When it repudiates its contract, the holder of the obligations of the government comes into Court, and demands judgment for the face value of the obligations. That holder is entitled to judgment for the full amount, but cannot have that full amount, if the government may arbitrar-

ily strike off five, fifteen or ninety-five per cent. of the amount that is due according to the terms of the contract.

If such a position as that occupied by the government, be tenable in law, it must fall under the condemnation which is pronounced by Mr. Chief Justice Marshall, in *Fletcher v. Peck* (6 Cranch, 87, 132):

"And for a party to pronounce its own deed invalid, whatever cause may be assigned for its validity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

It is believed that this is the first case in which an attempt has been made upon the part of the government, to repudiate the obligations that are contained or expressed in written promises issued by it. It is not a mere question of the imposition of a tax upon dead men's estates; it is not a mere question of robbing infant children and orphan asylums. It is a question that reaches the honor of the government itself; it is a question of power to repudiate, as well as of the morality of repudiation, by the government, of its solemn obligations; it is a question of whether the government may borrow from one of its own citizens, or from a money lender abroad, and then repudiate its contracts by the use of language importing the imposition of a tax upon the money represented by the bonds of the government.

It would make no difference if it should be held that this tax purports to be imposed upon the inheritance of the government bonds, and not upon the bonds themselves. If it be within the power of Congress to impose

a tax upon an inheritance of the bonds, it is within its power to impose a tax upon any transfer of the bonds. If it be within its power to impose a tax upon any transfer of the bonds, it is difficult to understand why it is not likewise within its province to impose a tax upon the ownership of the bonds. If there may be imposed a tax of fifteen per cent. upon the inheritance of the bonds, no substantial reason exists why there may not be imposed a tax of ninety-five per cent. upon similar inheritance. If Congress has the power to make in the amount of its tax, a discrimination between individuals from whom the bonds are transferred, it may make discrimination as well when the transfer is in the lifetime of the original owner, as when it is upon his death. Having promised to pay one hundred cents on the dollar, it may evade that promise, by imposing a tax of fifteen or fifty per cent, upon every transfer of its obligations.

To sum up the whole thing, if this law may be upheld, in so far as it imposes a tax upon an inheritance of government bonds, the same reason which will uphold the law, will uphold any act of Congress repudiating the payment of the whole debt repudiated by the bonds of the government. At present, we are not under the necessity of discussing the validity of any such act of Congress, but when we come before this Court substantially in the same position as if we were suing upon the obligations of the government, we have a right to ask the Court to regard the petitioner in a position the same as if he were demanding one hundred cents upon the dollar of the obligations issued by the government. By that is

meant, that if he were suing upon the original bonds, it would be no defence for the debtor to say that it had concluded to pay only eighty-five cents on the dollar. Judgment should go for the full amount. If by virtue of threats of imprisonment and confiscation of property, the government has chosen to say, that it will reduce indebtedness by fifteen per cent., this Court ought not to recognize that act of the government, any more than it would if judgment were being asked in a direct suit upon the original obligation.

The position of the plaintiffs in error cannot be evaded by the government, upon the authority of cases which have decided that it was within the power of the government to impose a duty, impost or excise, upon transfers of property, or devolution of title. The language of this act takes the present case out of the authority of those decisions which have passed upon the validity of other taxes imposed by the Congress, where the tax was clearly upon transfers of title.

In some respects, the language used in this War Revenue Law is inconsistent in its different provisions. For instance, section 29 commences with a declaration that the persons having in charge or trust, as administrators, executors or trustees, legacies or distributive shares, *"shall be and hereby are made subject to a duty or tax."* In section 30, the tax required to be paid is *"The duty or tax assessed upon such legacy or distributive share,"*—and further on it speaks *"of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon."*

It has been attempted to show in the preceding pages of this brief, that the tax complained of is a direct tax, because imposed upon the executor having charge of the estate. The language used in section 30 would seem to indicate that a tax is imposed upon the legacy or distributive share itself, but in either case, it cannot be contended that the tax was imposed, or attempted to be imposed "upon devolution of title," or "transfer" by will.

In *Scholey v. Rew* (23 Wall. 331), the decision is placed squarely upon the ground (p. 348): "That the 'subject matter of the assessment is the devolution of the 'estate or the right to become beneficially entitled to the 'same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified 'in the other parts of the section."

In the various cases decided by this Court, and reported in 173 U. S. 509, and entitled variously "*Nichol v. Ames*," "*In re Nichols*," "*Skillen v. Ames*," and "*Ingwersen v. United States*," the decision was with reference to a construction of section 6 and a portion of schedule "A" of this Act of Congress now under consideration. In the opinion of Mr. Justice Peckham in these cases, he says (pp. 518, 519):

"Various cases are cited, from *Brown v. Maryland*, "12 Wheat. 419, down to those involving the validity of "the income tax, 157 U. S. 429; 158 U. S. 601, for the "purpose of proving the correctness of this proposition. "All the cases involved the question *whether the taxes to "which objection was taken amounted practically to a "tax on the property. If this tax is not on the property "or on the sale thereof, then these cases do not apply."*

The application of the various cases referred to by the learned justice seems to have been made to depend upon the question whether the tax under consideration was on the property, and when he says that if the tax was not on the property, or on the sale thereof, the cases do not apply, the Court makes inapplicable to the present case the authority of the cases last cited.

The tax that was there under consideration was upheld, because "the tax is in effect a duty or excise laid upon the privilege, opportunity or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act." If the Court had reached the conclusion that the tax was upon the property itself, it is reasonable to infer that the decision would have been different.

There is no possible construction that can be given to section 29 now under consideration, which can vary its meaning, as expressly stated in the language used therein, that the executor himself should be subject to the tax, unless it be the language used in the same act, which speaks of the tax as assessed upon a legacy or distributive share.

In either event the tax is a direct tax upon person or property, and in so far as it is made applicable to the government bonds referred to, it cannot be defended by any subterfuge in the use of language that it was not intended to be a tax upon the bonds themselves.

GENERAL REMARKS.

It has been learned by counsel presenting this brief that other counsel holding the same position that is attempted to be here taken have filed their briefs, in which an elaborate review is made of the various previous decisions of this Court. It is for this reason that there has not in this brief been attempted an elaborate analysis of other cases decided by this Court or other cases to which attention of the Court has been called.

It is believed that the question as to the taxation of government bonds, is practically of first impression. If that question be not considered, in connection with the disposition of the question of the constitutionality of the law now being considered, in the other cases before the Court, it is probable that opportunity will be asked to make more elaborate the argument which is presented upon that question.

What has been said above seems to be sufficient to require a disposition of that question in favor of the plaintiffs in error. Nevertheless, it is considered that probably further research, and a more elaborate presentation of argument may aid the Court in a satisfactory disposition of the question.

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SUPPLEMENTAL SERIES

FOR PLANTING IN GARDENS

CHARLES E. WATSON

OF CALIFORNIA

Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as executor, etc., of Jane H. Sherman, deceased,
Plaintiff in Error,
against

JOHN G. WARD,, Collector,
etc.
Defendant in Error.

No. 458.

GEORGE D. SHERMAN,
Plaintiff in Error,
against

THE UNITED STATES,
Defendant in Error.

No. 459.

Supplemental Brief for Plaintiffs in Error.

Counsel for the plaintiffs in error is somewhat in doubt as to whether or not the privilege of filing an additional brief is limited strictly to a reply to supplemental brief filed by the Solicitor General. It is not intended to take advantage of the privilege of filing a further brief, or of the courtesy of the court, by introducing matters that have been presented on the main argument,

and the discussion of which is supposed to have been exhausted.

It happened that the brief upon the part of the government was not filed with the clerk until the afternoon of Monday, the 4th of December, and the argument of the cases commenced on Tuesday. It is true that on Saturday, the 2d of December, some of the counsel for the appellants and plaintiffs in error were privileged to see the galley proofs of the brief of the Solicitor General, but aside from this, there was no opportunity to file a brief in reply at any time before the argument.

The position taken by the Solicitor General was so novel, that it had not been anticipated, except to a very limited extent. It was conceived that the case opened up full opportunity for a discussion as to the tax being a tax upon property, and it was anticipated that there might be raised and opened the question of a tax upon inheritance or devolution of title. None of the counsel representing appellants or plaintiffs in error, had anticipated that the government would rest its case solely upon a claim that the tax in question was *a duty or excise "upon the right or privilege of the owner of property to "transmit it on his death, by will or descent, to certain "persons."*

POSITION OF THE GOVERNMENT.

The paragraph or point upon the original brief of the government numbered "V" seems to take the position, and to claim, that it is not the person of the executor, administrator or trustee upon whom the tax is imposed.

The tax is not upon the property in the hands of the executor or administrator.

"A careful reading of the act does not lead to the conclusion that Congress intended to tax the privilege of receiving a legacy or distributive share."

Reasoning thus by exclusion, the conclusion is reached that the tax is "a duty or excise upon the right or privilege of the owner of property to transmit it on his death."

Amongst other answers that may be made to this proposition is this: THE STATUTE DOES NOT SO IMPOSE THE TAX.

It may be further said that if the tax is upon such a right or privilege, there must go free estates that are now subjected to the tax, where by reason of the decedent's being *non sui juris*, he is possessed of no privilege which he can exercise.

The learned Solicitor General anticipates and undertakes to avoid the objection to his argument that the statute does not by its language impose a tax upon the privilege of transmitting an estate by taking the position—as he does in his point numbered "IV"—"that the constitutionality of a law making an exaction for purposes of revenue, depends upon its operation and effect, and not upon the form it may be made to assume." To a certain extent, this may be true, but when applied to particular cases, it is fallacious.

The object of the law in question was the collection of revenue;—its operation and effect were to accomplish that object. Carried to its full extent, the argument

upon the part of the government would be, that any law which provides a revenue, is constitutional. This, of course, will not be contended for. But if the law is to be measured by its operation and effect, it would seem to be incontrovertible that an unconstitutional law may be as operative and effective, for the purposes of raising a revenue, as one that is constitutional. If the test of the constitutionality of a law be its operation and effect, and if the purpose of the law be within the limits of the constitution, there are few laws that will require the aid of this court in their construction.

The argument of the Solicitor General seems hardly to stop short of the proposition that if Congress, for the alleged purpose of collecting revenue, should pass a law, that, construed strictly, or construed liberally, would be, upon its face, unconstitutional, the Department of Justice may interline between the title of the law and the alleged object for which the law was enacted, a new statute, which in its terms shall be constitutional. If the Congress should impose a direct tax upon individuals, disregarding the rules of apportionment prescribed by the constitution, such a law would be acknowledged by all to be unconstitutional. If the position of the Solicitor General in this case be sound, solely and only because the object for which revenue is to be raised is lawful, and in its operation and effect that object is accomplished, the court will be called upon to disregard the unconstitutional features of the law, also to disregard the plain language of the statute, and to construe the law as levying a duty or impost, or excise,

upon some intangible right or privilege which pertains to the person assessed for the tax, and which is nowhere mentioned in the statute.

The position of the United States is absolutely untenable, that the tax under consideration is a duty imposed upon the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity or to strangers. The learned counsel for the government has not answered the suggestion made to him, that where a person dies intestate, he does not exercise any such privilege. If he had made the only answer that it is conceivable can be made to this, the answer would fall short of meeting the objection to his proposition. He might say that the person dying has the privilege, although he does not exercise it. In the same way it may be said, that every man, fifty years of age, has had the equal privilege with other more enterprising citizens, that have outstripped him in the race for wealth, of being a millionaire. The privilege has never been reduced to possession, except in comparatively few instances. It would be unjust to impose a tax upon a man, or upon his estate, upon the basis of his being a millionaire, merely because he had a right to be one, but had never exercised the right. So it may be said that a tax could not be imposed upon an intestate because of his privilege of transmitting property, when he never exercised that privilege.

If the contention of the appellants and plaintiffs in error is defective in regard to this position, there still remain the cases of infants and lunatics, who have not,—

and who die without ever having,—the privilege of transmitting property. The tax should not rest upon them under the circumstances, and under the contention of the defendant in error, their estates should be exempt. In such case there would be a violation of rules of uniformity whether the word be used in its natural, literal sense, or be construed unnaturally and restricted to the forced construction of geographical uniformity.

In escheats the state takes the whole property, but if this law be enforced it must be subject to the tax.

UNIFORMITY.

If the tax in question be construed to be a duty, impost or excise, the question as to what constitutes uniformity in the imposition of such a tax, was so fully discussed on the oral argument, as well as in the briefs filed with the court, that it may be considered an encroachment upon the privilege of filing an additional brief, if an attempt be made to add anything on that subject.

If the court be of the opinion that that subject is fully exhausted, and no privilege to make additional suggestions with regard to it has been accorded to counsel, it is respectfully asked that the suggestions now here made, be passed and omitted from the perusal of the justices, without rebuking counsel for presenting them.

There seems to be no escape from the position that if the word "uniform," as used in the constitution, is to be accorded its ordinary, broad, legitimate definition, such a tax as is here imposed cannot be upheld as uniform.

The claim, however, is made, that the words "uniform throughout the United States" imply mere geographical or territorial uniformity.

Questions were asked counsel engaged in the argument of this case, by certain of the justices, which evidently made reference to a lack of uniformity common under correct internal revenue legislation, and such as has prevailed without question from the commencement of the constitutional government. For instance, there is a tax upon whiskey, which is the same upon that commodity when of different qualities or different values. There is a custom duty upon the importation of sugars, which is specific and uniform in amount, without regard to the quality of the sugars imported. The inquiry is natural if such laws can be upheld as constitutional, why do they not afford ground for limiting the word "uniformity?"

The question is exceedingly pertinent, and the position assumed in asking it is strongly entrenched behind the argument which comes from a continued line of legislation for the collection of customs upon imports, as well as for the collection of internal revenue. At the same time there seems to be a fundamental error in taking this position and which comes from disregard of the historical definition, which belongs to the words "duties, imposts and excises." When those words were incorporated into the constitution, they had already acquired a significance which was based, to some extent, upon the practice of governments in imposing taxes of the classes mentioned. The very words, "duties, im-

posts and excises" included within the legitimate definition of those words, the *classification* of articles that were subject to such taxes.

A duty, whether a customs duty, or an excise duty, would cease to be a duty, as the word was then used and properly defined, if under the right of impost duty there were not the right to annex to it all the usual concomitants and accessories. In the constitution, the particular words referred to must have been used with reference to the particular rules, methods and customs which prevailed in the imposition, by all countries, of duties, imposts and excises. There was no intent, therefore, in the requirement that such taxes should be uniform, that there should not be a classification of the articles under them. If admitting this seems to give strength to the position taken by the government, that the word "uniform" is satisfied, if the revenue laws are geographically uniform, it, nevertheless, does not follow, that because there may be classification of articles subject to tax, without infringing upon the right to use the word "uniform," therefore the use of the word uniform is satisfied if the law be the same in every place throughout the United States.

The opinion of Mr. Justice Miller in the *Head Money Cases* (112 U. S. 580, 594), is frequently quoted upon the question of uniformity of taxation, and is relied upon as establishing, or if not establishing, as a strong argument in favor of so construing the word "uniform," as to restrict its use. He says: "The tax is uniform when it operates with the same force and effect

"in every place where the subject of it is found." The force of the argument in favor of geographical uniformity, seems to rest upon the words "in every place." What becomes of the words that are used in the same sentence, "with the same force and effect," and "where the subject of the tax is found?"

The subject of the tax in this case, is not a subject that has varying qualities and varying values. The subject at all times is "legacies or distributive shares arising from personal property. The tax, if not a direct tax, upon the administrator, executor or trustee, is a tax assessed upon the assets of the estate of the decedent. Gross assets are reduced to cash,—theoretically, if not in practice,—and the tax is upon different portions of those assets, not by a rule that operates with the same force and effect wherever assets are found, but according to rules which vary, and which vary geographically, as well as vary in single localities. The tax does not operate with the same force and effect in every place, where the subject of it is found. The subject of the tax is subjected to different gradations, according to various circumstances, in the same locality, and in different localities according to varying rules, which distinguish the laws regulating the distribution of assets in one state, from those which obtain in another.

While it may be conceded, and is probably true, that there may be an unvarying tax of a dollar and ten cents a gallon upon grades of whiskey manufactured in the United States, regardless of the quality of the whiskey, or that the tax may be lawfully varied according as the

quality and grade of the whiskey vary, there would be a lack of uniformity, if the tax should be imposed upon the purchaser of the whiskey, and should vary not only because of classification with reference to its quality, but also by classification dependent upon the wealth of the distiller who manufactured the whiskey.

The subject of the tax is the whiskey. That tax will not operate with equal force and effect, in every place where the whiskey is found, if the tax varies in proportion to the wealth of the distiller.

As defensible as is the present law, would be the law that provided that a man who purchased his whiskey from a dealer that was not worth ten thousand dollars, could have it free of tax, while if he purchased from a dealer that was worth more than a million of dollars, he must pay fifteen per cent. tax. It could hardly be contended that such a law as is here suggested, would be constitutional, yet it is parallel with the law now under consideration.

"It is of the very essence of taxation that it be levied
"with equality and uniformity, and that there should
"be some system of apportionment."

Cooley, Const. Lim. 495.

"It is a sacred duty to impose the burdens equally,
"and to enforce the maxim of law and ethics that equal-
"ity is equity."

*People v. Commissioner of Taxes, 76 N. Y.
64, 71.*

"Equality of taxation is a fundamental principle of
 "our government which no legislation, in the absence of
 "the most explicit provisions, will be presumed to have
 "intended to violate."

People v. Supervisors of New York, 20 Barb.
 81, 88; S. C., affirmed, 16 N. Y. 424.

The reason for the use of the words under consideration in the constitution, is not found solely in a desire to protect the residents of one state from the imposition of taxes that should not be imposed upon equal terms in other states. There must of necessity have been in the minds of the delegates to the convention framing the constitution, that this was to be a Republican form of government, where classes were abolished, and where the tax-imposing power was vested in the voters. The then current history of European, to say nothing of Asiatic countries, must have brought to the minds of the framers of the constitution, the evils that existed, and had existed, for hundreds of years, in monarchical governments, where estates of single, wealthy individuals would oftentimes be absolutely confiscated, for the purposes of raising revenue, while court favorites would be permitted to escape the payment of any tax whatever. There was need for imposition of some restraint upon the power of the Congress to discriminate, or to make classes, arranged according to difference in wealth. When direct taxes were under consideration, the apportionment of such taxes upon the same lines that control the apportionment of representatives, seemed to provide ample security.

Upon the question of duties, imposts and excises, protection could be had by making them all uniform, so that the tax should bear equally upon rich and poor alike. This leads to a construction which seems to be reasonable, and to produce a far more salutary effect than will result from the adoption of the narrow use of the word "uniform," that is contended for by the government.

No one has heard from the plaintiffs in error in any of these cases, the expression of solicitude for the future of the republic, which is referred to on page 43 of the brief for the government. It is not believed that the end of the government will be at hand, by reason of any decision which this court can possibly make in this case. At the same time, it must be apparent, that if the classifications that are found in this law are upheld by this court, as within the power of Congress, then Congress can exercise the power of taxation, to the extent of the absolute destruction of any particular class of citizens who may be obnoxious to the majority which elects the members of Congress.

If Congress may make a line of exemption at \$10,000, it may draw that line at \$100,000, or it may draw it at \$1,000,000. If it may impose a tax of fifteen per cent. upon estates of more than a million of dollars, it may impose a tax of fifty per cent. upon like estates, or ninety-nine per cent. upon estates of upwards of \$5,000,000.

If such powers exist, it will be because this court will construe the word "uniform" in an unnatural and nar-

row sense; while giving to that word its natural and legitimate signification, will result in a beneficial construction of the constitutional provision in question, which will be conservative and a protection against inequality.

It has been suggested that all governments at all times recognize certain amounts and certain classes of property as worthy to be exempted from taxation, and that a right to make certain exemptions exists. This may be conceded to be true to a certain extent. It is not true to the extent that, under our constitution, the Congress has power arbitrarily to pick out certain classes, or certain amounts of property, without any good reason therefor, and exempt them from taxation, at the same time imposing a heavy tax upon other properties of the same kinds and qualities, when held by other individuals.

In this case, estates of \$10,000 or less are absolutely exempted from taxation. Of course, this exempts by far the largest portion of the whole population, when numerically considered. It exempts more than half of all personal estates.

It may be said that if Congress may draw the line, it may draw it where it pleases. If this be so, this exemption must be upheld, even though it discriminates against the rich and persons in moderate circumstances. It is believed, however, that it is not true that Congress has a right to fix a line of distinction, wherever it may choose to draw that line, for the purposes of taxation, and it is also insisted that the line is drawn here in an unreasonable way, and so as to exclude whole townships

and counties, and the great bulk of personal property in the whole country. A line may properly be drawn, when the amount exempted is so small that the maxim *de minimis lex non curat* will apply, or when the collection of the tax will involve more expense than the amount of the tax itself. When we go far beyond such a line as that, and make a distinction which involves a difference, actually of wealth itself, the uniformity provided for by the constitution is destroyed.

LACK OF GEOGRAPHICAL UNIFORMITY.

Aside from the question that was raised by Mr. Carlisle upon his brief, of the omission from the District of Columbia from the operation of this tax, there is a lack of territorial uniformity, by reason of the different laws of intestacy in the different states. That such differences exist, the different members of this court must all of them know.

In the brief already filed attention has been called in one instance to the different laws of different states upon this subject. Similar differences exist in different states. Under the rules of the common law, where a married woman died intestate, even though she left children, her husband would take the whole of her personal property. Such, it is believed, is still the law in many states. In others, it has been changed by statute, where it is provided that if a woman dies intestate, leaving a husband and children, the husband will take only one-third, or a half of the personal property, the balance going to the

children. In such cases, if the estate be more than ten thousand dollars, whatever the husband receives, he receives free of tax. Therefore under this law, a personal estate of a married woman dying intestate, would be in one state absolutely free from the tax imposed here and in another state subjected to a tax reaching one-half or two-thirds of the whole personal property. Geographic-ally considered, therefore, the law is not uniform.

In *Gilman v. City of Sheboygan* (2 Black, 510), this court adopted an opinion of the Supreme Court of the state of Wisconsin upon the subject of uniformity of taxation, in an opinion written by Mr. Justice Swayne, from which the following is quoted:

"In *Knowlton v. The Supervisors of Rock County* (9 "Wis. Rep. 410), the section requiring uniformity of "taxation underwent an able and exhaustive examina- "tion. The Court affirmed the following propositions:

" "The levying of taxes by the authorities of a county, " "city or town, for their support is as much an exercise " "of the taxing power as when levied directly by the " "state for its support. The state acts by municipal gov- " "ernments, and their acts in levying taxes are as much " "the act of the state as if the state acted by its own " "officers.

" "The constitution of the state requires, as a rule in " "levying taxes, that the valuation must be uniform and " "in all cases alike or equal, operating alike upon all " "the taxable property throughout the territorial limits " "of the state or municipality within which the tax is " "to be raised. And where the legislature prescribed a " "different rule, the act is a departure from the constitu- " "tion, and therefore void.

“ ‘The constitution has fixed one unbending uniform
 “ ‘rule of taxation for the state, and property cannot be
 “ ‘classified and taxed as classed by different rules.

“ ‘The provision of the constitution, that taxes shall
 “ ‘be levied upon such property as the legislature shall
 “ ‘prescribe, does not sanction a discrimination which
 “ ‘provides for taxing a particular kind of property for
 “ ‘the support of government by a different rule from
 “ ‘that by which other property is taxed; for when the
 “ ‘kind of property is prescribed the rule of taxation
 “ ‘must be uniform. All kinds of property must be
 “ ‘taxed uniformly, or be absolutely exempt.’

“ ‘In this case under the provisions of the charter of
 “ ‘the city of Janesville, lands within the city limits laid
 “ ‘out into city lots, and other lands not so laid out, had
 “ ‘been taxed at different rates, and the property of the
 “ ‘plaintiff had been sold for the non-payment of the
 “ ‘taxes. The court held the tax void, and enjoined the
 “ ‘treasurer from executing deeds to the tax purchasers.

“ ‘In the case of *Weeks v. The City of Milwaukee et al.*
 “ ‘(10 Wis. Rep. 242), the preceding case was considered
 “ ‘and approved by the court. The proposition that the
 “ ‘constitutional provision requiring the ‘rule of taxation
 “ ‘to be uniform’ extends to municipal corporations, and
 “ ‘that the constitutional provision requiring the legisla-
 “ ‘ture to restrict their powers of taxation was only in-
 “ ‘tended to furnish a further protection, were expressly
 “ ‘and unanimously reaffirmed. They held further, that
 “ ‘where the assessors of the city of Milwaukee, in obedi-
 “ ‘ence to an ordinance of that city, omitted to assess
 “ ‘property to the value of \$150,000, which ought to have
 “ ‘been assessed, and that property was thereby exempted
 “ ‘from taxation, the omission was fatal to the entire tax,
 “ ‘and that the complainant’s taxes being increased by the

“omission he was entitled to an injunction to restrain the sale of his lands for such illegal taxes.

“In *Sanderson v. Cross* (10 Wis. Rep. 282), the doctrines of *Knowlton v. The Supervisors of Rock County* were again unanimously approved.

“In their opinion the court adopt the following language from the *City of Zanesville v. Richards* (5 Ohio State Rep. 589): ‘The general assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate per cent. must be levied upon all property subject to taxation according to its true valuation money, so that all may bear an equal burden.’

“The Ohio case was decided under provisions in the constitution of that state similar to those in the constitution of Wisconsin, to which we have referred.

“In *The Attorney General v. The Winnebago Lake and Fox River Plank Road Company* (11 Wis. Rep. 42), the court say: ‘It cannot be denied that under the power of exemption unjust enactments in respect of the power of taxation might be made. But those who framed the constitution did not see fit to prevent such evils by depriving the legislature of the power. But they did provide that whatever property was made taxable *at all* should be taxed by a uniform rule, which was designed to secure equality in the burdens as between the different kinds of taxable property, but of course not as between property taxable and that not taxable.’

“The court refer with approbation to *The Exchange Bank of Columbus v. Hines* (3 O. S. Rep. 1). In that case the Supreme Court of Ohio say: ‘Taxing is required to be by a “uniform rule”—that is, by one and

“the same unvarying standard. Taxing by a uniform
 “rule requires uniformity not only in the *rate* of taxa-
 “tion, but also uniformity in the mode of assessment
 “upon the taxable valuation. Uniformity in taxing
 “implies equality in the burden of taxation, and this
 “equality of burden cannot exist without uniformity
 “in the mode of assessment, as well as the rate of taxa-
 “tion. But this is not all. The uniformity must be
 “co-extensive with the territory to which it applies.
 “If a state tax, it must be uniform all over the state.
 “If a county or city tax, it must be uniform through-
 “out the extent of the territory to which it is applicable.
 “But the uniformity in the rule required by the consti-
 “tution does not stop here. It must extend to *all prop-*
 “erty subject to taxation, so that all property may be
 “taxed alike—equally—which is taxing by a uniform
 “rule.’

“We forbear to examine the soundness of the conclu-
 “sions of the Supreme Court of Wisconsin. They need
 “no support at our hands.

“We could add nothing to what they have so well and
 “ably said in vindication of their own views. Such a
 “discussion would encumber this opinion without throw-
 “ing any new light upon the subject.” (Pages 515, etc.)

POWER OF CONGRESS.

The case of *Brown v. State of Maryland* (12 Wheat.
 419), is very frequently referred to, and has been re-
 ferred to upon the present argument several times. As
 bearing upon the present proposition, it is desired to
 quote from the opinion in that case the following (p.
 439):

“Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of that which is universally acknowledged, and which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.”

It is possible that Mr. Chief Justice Marshall was too sanguine in his assertion contained in last sentence of the passage just quoted. That madness might overtake a nation was apparently in the minds of the delegates to the constitutional convention, for the excitement which was then precipitating the French Revolution was having its contagious effect through the whole world. It is not an imposition upon credulity to consider that the existing state of affairs in France at that time inspired the clause of the constitution which required an equality of taxation.

A question of power that involves the making of a classification does sometimes depend upon the degree to which it may be exercised. Certainly this is true if making distinctions and exemptions can be regarded as

the making of classifications. It may be conceded that Congress has power to make such exemptions from a tax, as will relieve the government from the burden of a greater expense in the collection of the tax than the amount of the tax itself, without admitting or conceding the right of the government to classify estates paying taxes, according to the amount of those estates.

In connection with this consideration, the words used by Mr. Justice Peckham in *Nicol v. Ames* (173 U. S. 521) are not inapplicable:

"The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. *Gulf, Colorado, etc., Railway v. Ellis*, 165 U. S. 150-155; *Magon v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294. If the classification be proper and legal, then "there is the requisite uniformity in that respect."

The making of classes dependent for their existence solely upon difference in amount of possessions is utterly abhorrent to all the principles which underlie the constitution. Such are the classes created by the law in question. The classification "*is only and simply arbitrary, based upon no real distinction and entirely unnatural.*"

TAXATION OF GOVERNMENT BONDS.

In his additional brief, the learned Solicitor General says this:

"The government of the United States has never

"agreed, so far as I know, not to tax property invested
"in its own bonds. It has expressly prohibited the taxa-
"tion of its bonds by any state or municipality or local
"authority."

It is true that there has never been an act of Congress, which says in so many words, that the government of the United States will not impose a tax upon its promises to pay. It is also true that it has expressly prohibited the taxation of its bonds by any state or municipality or local authority. The very fact that it has imposed a prohibition upon states, municipalities and local authorities, against the taxation of the bonds of the government, seems to furnish a guarantee that the bonds shall be free from all taxation whatever. The government says that it will pay one hundred cents on the dollar, and in order to make its obligation the more secure, it says that this promise shall not be subject to taxation by states or municipalities. It was not necessary that it should say that its promises should not be subject to taxation by itself.

It has agreed to pay in full. Its agreement will not be kept, if, under pretence of taxation, it deducts any thing from the amount which it has agreed to pay.

No case has come before this court, it is believed, in which there has been raised the question of the power of the government to impose a tax upon its own promises to pay. It does not require any great effort to learn why this question has never before been presented to this court. It was never until there was a session of the Fifty-fifth Congress, that a policy of repudiation had so

far obtained possession of the national Legislature, that it was deemed possible that the promises of the government could be repudiated under the pretext of taxation. Never before the present law has there been any similar law to invite the judgment of this court.

The mere fact, however, that a law is novel, does not relieve the court from an examination of its terms, to determine whether it is within the constitutional powers of the law-making body of the government.

There may have been many cases that have been before this court, and before the highest courts of the different states, where the question has been raised of the power of a state or of a municipality, to tax the bonds or obligations issued by itself.

The learned Solicitor-General has taken pains in his additional brief, to call attention to one of these cases. It is the case of *Murray v. Charleston* (96 U. S. 432). How anything that is said in this case can aid him in maintaining his position, it is difficult to conceive. That there is much in the case that is worthy of consideration as bearing upon the present case, is evident. The attention of the court is respectfully called to the following rather lengthy quotation from the opinion of Mr. Justice Strong (p. 443):

“We come, then, to the question whether the ordinances decided by the court to be valid did impair the obligation of the city’s contract with the plaintiff. The solution of this question depends upon a correct understanding of what that obligation was. By the certificates of stock, or city loan, held by the plaintiff, the city

"assumed to pay to him the sum mentioned in them,
 "and to pay six per cent. interest in quarterly payments.
 "The obligation undertaken, therefore, was both to pay
 "the interest at the rate specified, and to pay it to the
 "plaintiff. Such was the contract, and such was the
 "whole contract. It contained no reservation or restric-
 "tion of the duty described. But the city ordinances, if
 "they can have any force, change both the form and ef-
 "fect of the undertaking. They are the language of the
 "promisor. In substance they say to the creditor:
 "'True, our assumption was to pay to you quarterly a
 "'sum of money equal to six per cent. per annum on the
 "'debt we owe you. Such was our express engagement.
 "'But we now lessen our obligation. Instead of paying
 "'all the interest to you, we retain a part for ourselves,
 "'and substitute the part retained for a part of what we
 "'expressly promised you.' Thus applying the ordi-
 "nances to the contract, it becomes a very different thing
 "from what it was when it was made; and the change is
 "effected by legislation, by ordinances of the city, en-
 "acted under the asserted authority of laws passed by
 "the legislature. That by such legislation the obligation
 "of the contract is impaired is manifest enough, unless
 "it can be held there was some implied reservation of a
 "right in the creditor to change its terms, a right re-
 "served when the contract was made,—unless some
 "power was withheld, not expressed or disclosed, but
 "which entered into and limited the express undertak-
 "ing. But how that can be,—how an express contract
 "can contain an implication, or consist with a reserva-
 "tion directly contrary to the words of the instrument,—
 "has never yet been discovered.

"It has been strenuously argued on behalf of the de-
 "fendant that the state of South Carolina and the city
 "council of Charleston possessed the power of taxation

“when the contracts were made, that by the contracts the
 “city did not surrender this power, that, therefore, the
 “contracts were subject to its possible exercise, and that
 “the city ordinances were only an exertion of it. We
 “are told the power of a state to impose taxes upon sub-
 “jects within its jurisdiction is unlimited (with some
 “few exceptions), and that it extends to everything that
 “exists by its authority or is introduced by its permis-
 “sion. Hence it is inferred that the contracts of the city
 “of Charleston were made with reference to this power,
 “and in subordination to it.

“All this may be admitted, but it does not meet the
 “case of the defendant. We do not question the exist-
 “ence of a state power to levy taxes as claimed, nor the
 “subordination of contracts to it, so far as it is unre-
 “strained by constitutional limitation. But the power
 “is not without limits, and one of its limitations is found
 “in the clause of the Federal constitutional, that no state
 “shall pass a law impairing the obligation of contracts.
 “A change of the expressed stipulations of a contract, or
 “a relief of a debtor from strict and literal compliance
 “with its requirements, can no more be effected by an
 “exertion of the taxing power than it can be by the ex-
 “ertion of any other power of a state legislature. The
 “constitutional provision against impairing contract
 “obligations is a limitation upon the taxing power, as
 “well as upon all legislation, whatever form it may as-
 “sume. Indeed, attempted state taxation is the mode
 “most frequently adopted to affect contracts contrary to
 “the constitutional inhibition. It most frequently calls
 “for the exercise of our supervisory power. It may,
 “then, safely be affirmed that no state, by virtue of its
 “taxing power, can say to a debtor, ‘You need not pay
 “‘to your creditor all of what you have promised to him.
 “‘You may satisfy your duty to him by retaining a part

“for yourself, or for some municipality, or for the state treasury.’ Much less can a city say: ‘We will tax our debt to you, and in virtue of the tax withhold a part for our own use.’

“What, then, is meant by the doctrine that contracts are made with reference to the taxing power resident in the state, and in subordination to it? Is it meant that when a person lends money to a state, or to a municipal division of the state having the power of taxation, there is in the contract *a tacit reservation of a right in the debtor to raise contributions out of the money promised to be paid before payment?* That cannot be, because if it could, the contract (in the language of Alexander Hamilton) would ‘involve two contradictory things: an obligation to do, and a right not to do; an obligation to pay a certain sum, and the right to retain it in the shape of a tax. It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes in destruction of it.’ The truth is, states and cities, when they borrow money and contract to repay it with interest, are not acting as sovereignties. They come down to the level of ordinary individuals. Their contracts have the same meaning as that of similar contracts between private persons. *Hence, instead of there being in the undertaking of a state or city to pay, a reservation of a sovereign right to withhold payment, the contract should be regarded as an assurance that such a right will not be exercised. A promise to pay, with a reserved RIGHT TO DENY OR CHANGE THE EFFECT OF THE PROMISE, IS AN ABSURDITY.*”

The position taken by the government, that this is not a tax upon the bonds themselves, but upon the privilege

of transmitting the bonds, would seem to be an evasion of the true issue.

In *Nicols v. Ames* (173 U. S. 521), this court substantially said, *per Mr. Justice Peckham*, that a tax upon every sale made in any place, is really and practically upon property. If this means anything, it means that a tax upon ordinary sales of property is a tax upon the property itself. How a transfer of property, by transmission of title, differs from a transfer of property upon a sale, is left for the counsel for the government to explain. If the government may not tax its bonds directly, it ought not to be permitted to tax the negotiable features of those bonds. It ought not to impose a tax upon the transmission of the bonds by will, while it may not impose such a tax when the transmission is by bill of sale.

No line of reasoning can furnish an escape from the argument, that a tax upon a sale, transfer, or transmission of the bonds, is a tax upon the bonds themselves. Therefore, the question reverts from a tax upon the privilege of transmitting the bonds, to the question of a tax upon the bonds themselves.

The decision of the Court of Appeals of the state of New York, in regard to what were formerly known as "quarter sales" (*DePeyster v. Michael*, 6 N. Y. 467), while not by any means parallel with the present case, furnishes analogies which are worth consideration.

It seems that in making perpetual leases of lands in the state of New York, one Van Rensselaer reserved to himself an equal one-fourth part of all purchase prices

that might be paid upon sales of the lands in question, forever. The Court of Appeals of the state of New York held this reservation to be void, as being in restraint of alienation. The position of the court was that the condition was repugnant to the grant.

In this case, the government has promised to pay. It is utterly repugnant to that promise, that the government should reserve to itself the right to retract its promise, in part, or in whole.

The decisions in this court in the *Virginia Coupon Cases* seem to cover all the ground that is necessary to be covered by decision, while the special point to be decided is left without exact precedent.

In *Hartman v. Greenhow* (102 U. S. 679), the court, *per* Mr. Justice Field, uses this language:

“A contract was thus consummated between the state
 “and the holders of the new bonds, and the holders of
 “the coupons, from the obligation of which she could
 “not, without their consent, release herself by any sub-
 “sequent legislation. She thus bound herself, not only
 “to pay the bonds when they became due, but to receive
 “the interest coupons from the bearer at and after matur-
 “ity, to their full amount, for any taxes or dues by him
 “to the state. This receivability of the coupons for such
 “taxes and dues was written on their face, and accom-
 “panied them into whatever hands they passed. It con-
 “stituted their chief value, and was the main considera-
 “tion offered to the holders of the old bonds to surren-
 “der them and accept new bonds for two-thirds of their
 “amount.

“In *Woodruff v. Trapnall*, reported in 10th Howard,

"a provision in an act of Arkansas, similar to this one,
 "that the bills and notes of the Bank of the State of Ar-
 "kansas, the capital of which belonged to the state,
 "should 'be received in all payments of debts due to the
 "'state of Arkansas,' was held to be a contract with the
 "holders of such notes which was binding on the state,
 "and that the subsequent repeal of the provision did not
 "affect the notes previously issued. 'The notes,' said
 "the court, 'are made payable to bearer; consequently
 "'every *bona fide* holder has a right, under the twenty-
 "'eighth section (the one making the notes receivable
 "'for dues to the state), to pay the state any debt he may
 "'owe it in the paper of the bank. It is a continuing
 "'guaranty by the state that the notes shall be so re-
 "'ceived. Such a contract would be binding on an in-
 "'dividual, and is not the less so on the state.' 'And that
 "'the legislature could not withdraw this obligation
 "'from the notes in circulation at the time the guaranty
 "'was repealed, is a position which can require no ar-
 "'gument.' In *Furman v. Nichol*, reported in the 8th
 "Wallace, a similar provision in an act of Tennessee,
 "declaring that certain notes of the bank of that state
 "should be 'receivable' at the treasury of the state and
 "by tax-collectors and other public officers, 'in all pay-
 "'ments for taxes and other moneys due the state,' was
 "held by this court unanimously to constitute a valid
 "contract between the state and every person receiving a
 "note of the bank. An attempt was made in the case to
 "restrain the operation of the guaranty contained in the
 "provision to the person who received the note in the
 "course of his dealing with the bank, but the court said:
 "'The guaranty is in no sense a personal one. It at-
 "'taches to the note,—is part of it, as much so as if
 "'written on the back of it; goes with the note every-

“where, and invites every one who has taxes to pay to
“take it.”

“Yet, notwithstanding the language of the act of
“March 30, 1871, providing that the interest coupons
“of the new bonds should ‘be receivable at and after ma-
“turity for all taxes, debts, dues, and demands due the
“‘state,’ and this was so expressed upon their face, the
“Legislature of Virginia, less than one year after after-
“wards (on the 7th of March, 1872), passed an act de-
“claring that thereafter it should ‘not be lawful for the
“‘officers charged with the collection of taxes or other
“‘demands of the state’ then due or which should there-
“after become due, ‘to receive in payment thereof any-
“‘thing else than gold or silver coin, United States
“‘treasury notes, or notes of the national banks of the
“‘United States.’ This act, as seen on its face, is in di-
“rect conflict with the pledge of the state of the previous
“year, and with the decisions of this court to which we
“have referred. Its validity, as might have been ex-
“pected, was soon attacked in the courts as impairing the
“obligation of the contract contained in the Funding
“Act, and came before the Supreme Court of Appeals of
“the state for consideration in *Antoni v. Wright*, at its
“November Term of 1872. The subject was there most
“elaborately and learnedly treated. The cases above
“were cited by the court; and the provision of the Fund-
“ing Act was shown, by reasoning perfectly conclusive,
“to be a contract founded upon valuable considerations
“and binding upon the state. And as to the objection
“that such legislation might, and probably would, result
“in crippling the power and resources of the state in
“time of war or other great calamity, the court said, that
“legislation cannot well be adapted in advance to ex-
“traordinary and exceptional cases; that such cases will
“occur at all times with all nations, and must be pro-

“vided for by the wisdom and prudence of the government for the time being. ‘At such a time, however,’ said the court, in words full of wisdom, ‘the honored name and high credit secured to a state by unbroken faith, even in adversity, will, apart from all other considerations, be worth more to her in dollars—incalculably more—than the comparatively insignificant amount of the interest on a portion of the public debt enjoyed by breach of contract.’ The court thus expressed a great truth, which all just men appreciate, that there is no wealth or power equal to that which ultimately comes to a state when in all her engagements she keeps her faith unbroken.”

Further consideration of these cases is found in *Antoni v. Greenhow* (107 U. S. 769); *Virginia Coupon Cases* (114 U. S. 269); *McGahey v. Virginia* (135 U. S. 662).

If it be claimed that all these decisions thus referred to, are made to rest upon the narrow foundation that is found in the clause of the constitution which provides that a state shall not pass a law impairing the obligation of contracts, while there is no such prohibition placed upon Congress, this court ought to consider that there are some basic principles which underlie the letter of the constitution.

It is true that there have been decisions by this court, that the Congress of the United States is not prohibited from making such enactments as will impair the obligation of contracts. It is, however, true, that Congress has never before undertaken to make an enactment which invades the sacredness of the promises of the gov-

ernment itself. The right of the Congress to pass a law, which will relieve the government from the payment of the full amount of its bonds, is absolutely inconsistent with the burden imposed upon the government to keep faith with its creditors, and is the assertion of a right, the establishment of which will be absolutely subversive of the credit of the government itself.

In connection with this, the attention of the court is respectfully asked to a reperusal of the last few sentences above quoted from the opinion of Mr. Justice Field, in the case of *Hartman v. Greenhow*.

At the present time, and to the present amount, taxation of these bonds may be a matter of little importance. The recognition, however, of the possession by the Congress of the power here claimed, is a recognition of the possession, by the government, of weapons which may be lawfully used for the destruction of the credit of the country, and their use for the destruction of the credit of the country may involve the destruction of the government itself.

This court has denied to states and municipalities the power to impose a tax upon its own promises to pay. Aside from such arguments as come from the strict enforcement of the letter of the constitution, with reference to the impairment of the obligation of contracts, there is no argument which can be advanced to uphold the decisions of the courts in such cases, that are not pertinent to the case at bar. Reason and justice both demand that the government shall keep to the utmost extent and to the last cent its promises to pay, and shall

withhold nothing from its just creditors, either under pretence of taxation, or under the open assertion of an absolute right of repudiation.

CORRECTION.

In point "VIII" of the additional brief of the United States, the Solicitor General has called attention to a citation upon Mr. Patterson's former brief, of a ruling of the Treasury Department made December 23, 1898. It appears that lately, and since the publication of the volume from which this ruling was quoted, the Treasury Department has restricted that ruling, and reversed the conclusions therein contained. The court, therefore, will not regard any argument based upon the ruling first referred to.

ERRATUM.

On page 58, line 22, of the brief for plaintiffs in error, the word "repudiated" should be "represented."

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The United States
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Further Supplemental Brief in Support of the
Plaintiffs in Error.

CHARLES L. PATTERSON,

Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as executor, etc., of Jane H. Sherman, deceased,

Plaintiff in Error,
against

JOHN G. WARD, Collector, etc.,

Defendant in Error.

No. 458

GEORGE D. SHERMAN,

Plaintiff in Error,
against

THE UNITED STATES,

Defendant in Error.

No. 459.

Further Supplemental Brief on Behalf of the Plaintiffs in Error.

The question of the taxation of government bonds, in so far as it is involved in these cases, has been discussed, up to the present time, upon the assumption, that there is no statutory enactment of Congress exempting the bonds of the United States from taxation by the United States itself.

In his additional brief for the United States Collectors, the learned Solicitor General used these words,

which have been heretofore quoted:

"The government of the United States has never agreed, so far as I know, not to tax property invested in its own bonds. It has expressly prohibited the taxation of its bonds by any state or municipality or local authority."

Counsel for the plaintiffs in error followed this position of the government by saying:

"It is true that there has never been an act of Congress, which says in so many words, that the government of the United States will not impose a tax upon its promises to pay."

In all this I have overlooked, and I presume Mr. Richards has overlooked, a line of legislation, to which my attention has been called since it was supposed the case was finally submitted for the consideration of the Court.

Counsel for the plaintiffs in error took the law from the Revised Statutes, and there found section 3701 in these words:

"All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under state or municipal or local authority."

An examination of the Revised Statutes did not bring to light any further exemption from taxation than is provided for in this section.

It appears, however, that in 1870, there was passed "An Act to authorize the refunding of the national debt," the first section of which is as follows:

"That the Secretary of the Treasury is hereby authorized to issue, in a sum or sums not exceeding the aggregate two hundred million dollars, coupon or regis-

"tered bonds of the United States, in such form as he
 "may prescribe, and of denominations of fifty dollars, or
 "some multiple of that sum, redeemable in coin of the
 "present standard value, at the pleasure of the United
 "States, after ten years from the date of their issue, and
 "bearing interest, payable semi-annually in such coin,
 "at the rate of five per cent. per annum; also a sum or
 "sums not exceeding in the aggregate three hundred mil-
 "lion dollars of like bonds, the same in all respects, but
 "payable at the pleasure of the United States, after fif-
 "teen years from the date of their issue, and bearing in-
 "terest at the rate of four and a half per cent. per
 "annum; also a sum or sums not exceeding in the aggre-
 "gate one thousand million dollars of like bonds, the
 "same in all respects, but payable at the pleasure of the
 "United States, after thirty years from the date of their
 "issue, and bearing interest at the rate of four per cent.
 "per annum; all of which said several classes of bonds
 "and the interest thereon *shall be exempt from the pay-*
 "*ment of all taxes or duties of the United States*, as well
 "as from taxation in any form by or under state, munici-
 "pal, or local authority; and the said bonds shall have
 "set forth and expressed upon their face the above-speci-
 "fied conditions, and shall, with their coupons, be made
 "payable at the treasury of the United States. But noth-
 "ing in this act, or in any other law now in force, shall
 "be construed to authorize any increase whatever of the
 "bonded debt of the United States."

Here is a clear and unmistakable provision, that the
 bonds issued under the provisions of this act, shall be
 exempt from payment of all taxes or duties of the
 United States. It is also a matter of legislation and
 history, of which this Court must take cognizance, that
 there are no bonds of the United States outstanding (un-
 less lost or mislaid, and fully provided for), which were
 issued before this refunding act passed the Congress.

Therefore, this provision of this Chapter 256 of the Laws of 1870, is a provision controlling all government bonds, unless such as may be provided for in later legislation, and it makes them "*exempt from the payment of all taxes or duties of the United States.*"

Of course, a very pertinent query will be presented, as to whether or not this provision of the refunding act, with reference to the exemption of bonds from the payment of taxes or duties of the United States, was repealed when the Revised Statutes went into force, which were supposed to embody substantially all the general laws of the government.

Title LXXIV contains the repealing provisions of the Revised Statutes. Section 5596 is as follows:

"Sec. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision, having been repealed or superseded by subsequent acts, or not being general and permanent in their nature: *Provided*, that the incorporation into said revision of any general and permanent provision, taken from an act making appropriations, or from an act containing other provisions of a private, local or temporary character, shall not repeal, or in any way affect any appropriation, or any provision of a private, local or temporary character, contained in any of said acts, but the same shall remain in force; and all acts of Congress passed prior to said last named day, no part of which are embraced in said revision, shall not be affected or changed by its enactment."

If it be claimed that this operates to repeal Chapter

256 of the Laws of 1870, it is answered thereto as follows:

First.—The language of the repealing statute is not broad enough to call upon the Court to construe the section in question as a repeal of the refunding act.

Second.—In 1875, after the Revised Statutes had gone into effect, Congress recognized Chapter 256 of the Laws of 1870, as being still in force. In Chapter 15 of the Second Session of the Forty-third Congress, approved January 14, 1875, and being "An Act to provide for the resumption of specie payments," there is a provision that the Secretary of the Treasury be authorized to sell and dispose of:—

"Either of the descriptions of bonds of the United States described in the Act of Congress approved July fourteenth, eighteen hundred and seventy, entitled 'An Act to authorize the refunding of the national debt,'
"WITH LIKE QUALITIES, PRIVILEGES AND EXEMPTIONS,
"to the extent necessary to carry this act into full effect."

Thus Congress recognized the Act of 1870 as continuing to be in full force and effect, notwithstanding the repealing clause contained in the Revised Statutes.

Third.—All the government bonds issued since 1870—and none are now outstanding (unless such as may be lost or mislaid) except those issued in or since 1870—have written upon them that they shall be exempt from the payment of taxes of the United States. Upon the face of each one of these bonds, and in accordance with the terms of the act, there is a stipulation that:

"The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form, by or under State, municipal or local authority."

Fourth.—By section 33 of the Act of June 13, 1898, which is the Act now the subject of discussion before this Court, there is authorized the issue of four hundred millions of dollars of new bonds, with provisions for exemption from taxation by the United States *in the exact words and language contained in Chapter 256 of the Laws of 1870.*

Assuming the Acts of 1870 and 1875 to be unrepealed (unless by the War Revenue Law of 1898), and if counsel be correct in the claim that all bonds described in the complaints herein must be regarded as issued under the provisions of those acts [Mrs. Sherman died September 30, 1898, folio 3 record in *Sherman v. United States*], the only questions, upon this point, left for the Court to determine, are, whether the Act of June 13, 1898, repeals the previous laws which exempted government bonds from taxation, and, if not, whether the tax in question is a tax upon the bonds themselves.

It will be assumed that the Act of June 13, 1898, was not intended to repeal the previous laws which exempted government bonds from taxation. This will leave as the only question for consideration,—Does the present law impose a tax upon the bonds of the government?

Taking this as the exclusive question, if the tax be upon the bonds themselves, it must be regarded as unconstitutional and void, irrespective of the particular statutes to which attention has been called. This position seems to be, almost, conceded by the government, but the claim is made that the subject of consideration is not a tax upon the bonds themselves, but a duty upon the privilege of transmitting them.

Of course, if the Court shall hold that a tax upon the

gold of the temple is not a tax upon the temple itself; and a tax upon the gift lying upon the altar is not a tax upon the altar itself; and a tax upon the privilege of owning property is not a tax upon the property itself; and if a tax upon the privilege of negotiating property is not a tax upon the property itself; and if a tax upon the privilege of selling property is not a tax upon the property itself; and if a tax upon the privilege of inheriting property is not a tax upon the property itself; and if a tax upon the privilege of transmitting property by will is not a tax upon the property itself; and if a tax upon the privilege of dying intestate without transmitting property, when the state assumes the burden of transmitting it, be not a tax upon the property, the plaintiffs in error *may be* all wrong.

It is, however, respectfully submitted, that the decisions of this Court, and of other Courts, do not permit the government to take the position that it may impose a tax upon incidents to property, when it is prohibited from imposing the tax upon the property itself.

This question has been fully discussed in the various briefs that have already been filed with the Court upon the argument of the cause. At the same time, it seems important, in considering the statutes now referred to, that the attention of the Court should be called to a few decisions that have been heretofore cited.

In *Brown v. State of Maryland* (12 Wheat. 419, 444), the Court said:

"All must perceive that a tax on the sale of an article, 'imported only for sale, is a tax on the article itself.'"

If a tax upon the sale be a tax upon the article itself,

for like reasons it is claimed that a tax upon *any* transfer is a tax upon the article itself, whether the transfer be by bill of sale, or under the inheritance tax laws of any state or territory.

Upon the rehearing of the *Income Tax Cases*, *Pollock v. Farmers' Loan & Trust Company* (158 U. S. 601, 691), Mr. Justice Brown said this:

"I regard the doctrine as entirely well settled in this Court that *a tax upon an incident to a prohibited thing is a tax upon the thing itself*, and if there be a total want of power to tax the thing, *there is an equal want of power to tax the incident*" (citing cases).

This was in a dissenting opinion, but upon this point there was no dissent.

In the same cases, *Pollock v. Farmers' Loan & Trust Co.* (157 U. S. 429), this Court, by Mr. Chief Justice Fuller, uses this language (p. 581):

"If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each state. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this Court. Thus in *Brown v. Maryland*, 12 Wheat. 419, 444, it was held that the tax on the occupation of an importer was the same as a tax on imports and therefore void. And Chief Justice Marshall said: 'It is impossible to conceal from ourselves that this is varying the form, without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on

“ ‘the sale of an article, imported only for sale, is a tax
 “ ‘on the article itself.’ ”

Indeed, it would seem as if the decision of this Court in the *Income Tax Cases*, is sufficiently decisive of the claim that such a tax as is sought to be here imposed, is a tax upon the property itself, and if that property consists of government bonds, it comes within the prohibition of the statutes which constitute the agreement upon the part of the United States, that such bonds shall be exempted from taxation upon the part of the government itself.

Weston v. City of Charleston, 2 Pet. 460.
 Bank of Commerce v. New York City, 2 Black 628.
 Bank Tax Case, 2 Wall 200.
 Case of The State Freight Tax, 15 Wall 232.
 Cook v. Pennsylvania, 97 U. S. 562-572.

The War Revenue Law, being the Act of June 13, 1898, Sections 29 and 30 of which have been in these cases under consideration, contains express provision, in Section 33, for the issuing of four hundred millions of dollars of bonds of the United States, which “*shall be exempt from all taxes or duties of the United States, as well as from taxation in any form, by or under state, municipal or local authority.*”

The words used in this section are the identical words that are used in the above cited Act of 1870. Being made part of the statute which provides for the imposition of the inheritance tax, and being in a section of the statute later than the sections which provide for the imposition of that tax, it seems to be beyond question that Congress intended that the imposition of this inheritance tax, should not be regarded by any court as inconsistent

with an exemption from taxation of the obligations of the government. But the Court must recognize that such inconsistency will arise, if the tax be regarded as imposed upon the privilege of transmitting government bonds. Therefore, it must logically follow, that it was the intent of the Congress that the transmission of government bonds, or their inheritance, should be exempt from all taxes and duties of the United States.

In this connection, it is worthy of note, that the word "*taxes*" is supplemented by the word "*duties*," evincing an intention upon the part of the Congress to relieve such bonds, not only from direct taxes, but from such indirect taxes as are included under the designation in the constitution of "*duties, imposts and excises*."

It is not intended here to repeat the arguments that have already been addressed to the Court, but to call attention to the statutes that have been enumerated above, so that in its decision, the Court will not reach its conclusion, without having considered, at least, all the statutes that bear upon the question pressed upon the attention of the Court.

CHARLES E. PATTERSON,
Of Counsel.

OFFICE SUPREME COURT U. S.
FILED

JAN 15 1900

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Clerk.

Ex. 458 & 459.
Prof. of Southmayd & Rowe - Ex Case
Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed Jan 15, 1900.
No. 458.

GEORGE T. MURDOCK, AS EXECUTOR, &C., OF JANE H.
SHERMAN, DECEASED,

Plaintiff in Error,

vs.

JOHN G. WARD, AS COLLECTOR, &C.,

Defendant in Error.

No. 459.

GEORGE D. SHERMAN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

**BRIEF SUBMITTED BY LEAVE OF COURT, ON BEHALF OF
HOLDERS OF UNITED STATES BONDS.**

EVARTS, CHOATE & BEAMAN,

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Holders of United States Bonds.*

CHS. F. SOUTHMAYD,

In Person.

WILLIAM V. ROWE,

Of Counsel.



IN THE
Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as Executor, &c.,
of Jane H. Sherman, deceased,
Plaintiff in Error,

vs.

JOHN G. WARD, as Collector, &c.,
Defendant in Error.

No. 458.

GEORGE D. SHERMAN,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 459.

**BRIEF SUBMITTED, BY LEAVE OF COURT,
ON BEHALF OF HOLDERS OF UNITED
STATES BONDS.**

Intervening in this case—in the argument merely—by permission of the Court, on behalf of holders of United States bonds, for their interest in the question under adjudication, we confine this brief to a discussion of the terms, nature and effect of

the exemption from taxation by the United States, upon or in respect of the United States bonds now outstanding, which was created by means of the express provisions of the statutes under which such bonds were issued, and the declarations in that behalf inserted on the face of the bonds by the officials of the Government, in pursuance of the mandate of the statutes; disclaiming any intention to enter upon, review or interfere with, any of the discussions heretofore had, by or as between the direct parties to the litigation, in relation to the claim of such exemption, upon any other ground or basis than the express provisions and action above referred to, unless or except in so far as, if at all, anything in such previous discussion by or between the parties may bear prejudicially upon our claim of exemption by reason of these express provisions and this action above referred to.

While our views upon this subject are the result of mature reflection, the *method* of their expression in, and the *form* of, this brief, owing to the extreme haste required in its preparation—which will be readily understood in view of the short time allowed for filing—are extremely unsatisfactory to us. If the time had been longer, the brief would have been shorter. Under the circumstances, therefore, we must request the indulgent consideration of the Court, especially as these intervenors have had no opportunity for oral argument, although their interests far exceed those of the actual parties to the record.

I.

As to the express exemption of these bonds from "all" Federal taxation—the nature and scope of that exemption, and the rules of construction to be applied thereto.

We assume that the Court will take judicial notice of the fact (See letter of *Secretary of Treasury*, in *Appendix* to this Brief) that all the United States

bonds, now outstanding and running to maturity, have been issued under one or another of the three following mentioned acts of Congress, viz., the Act of July 14, 1870, commonly called the Refunding Act (16 Sts. at Large, 272), the Act of January 14, 1875, commonly called the Resumption Act (18 Sts. at Large, 296), and the Act of June 13, 1898, which is frequently called the War Revenue Act (30 Sts. at Large, 448, 467, § 33), though perhaps not quite accurately so, inasmuch as it makes provision for a new loan as well as for additional taxation.

In the *Appendix* to this brief is contained a statement, based upon statistics recently obtained by us from the *Treasury Department*, showing the *total issues*, the *amounts of the bonds of the respective issues outstanding* on December 31, 1899, which amounts cannot well have changed since then to an extent large enough to be material with reference to the present purposes, and also containing *copies of the specimen forms of these bonds of the several issues*, to which we have added the form of the 1898 bonds, to some of which forms of bonds we shall have occasion to refer hereinafter in more particular detail.

From this statement it appears that the outstanding bonds consist of—

1. \$545,366,550 of the four per cent. thirty year bonds issued under the Refunding Act of July 14, 1870, being part of the original issue of seven hundred and forty millions of such bonds issued under that act, the residue of such issue having been, we suppose, taken up by the Government, by purchase for the sinking fund or otherwise. These \$545,366,550 of bonds are what are commonly called the United States four per cent. bonds of 1907.

2. \$25,364,500 extended two per cent. bonds, being part of an original issue under the Refunding Act of 1870 of two hundred and fifty millions of four and a half per cent. fifteen-year bonds, upon or after the

maturity of which the time of payment was, by some arrangement between the holders and the Government, extended, with the rate of interest on them reduced to two per cent., and so as to leave the principal payable at the option of the Government at some indefinite future period.

This makes in all upwards of \$570,000,000 of now outstanding bonds issued under the Refunding Act of July 14, 1870.

3. \$95,009,700 of the five per cent. ten-year bonds, due February 1, 1904, being part of the one hundred millions of such bonds issued under the Resumption Act of January 14, 1875. These are the bonds commonly called United States five per cent. bonds of 1904.

4. \$162,315,400 of the four per cent. bonds, due February 1, 1925, being all of such bonds issued under the same Resumption Act of 1875. These are the bonds commonly called United States 4 per cent. bonds of 1925.

This makes in all upward of \$257,000,000 of now outstanding bonds issued under the Resumption Act of 1875.

5. \$198,679,000 three per cent. ten-twenty bonds issued under the War Revenue Act of June 13, 1898, part of the four hundred millions of such bonds authorized by that act, part of which authority was not exercised because of the speedy ending of the war.

These are known as the United States three per cent. bonds of 1908-18, they being payable in twenty years, but redeemable at the Government's option after ten years.

The whole amount of the outstanding bonds of the United States appears to be, or rather to have been on December 31, 1899, a little over one thousand and twenty-six millions of dollars, and the small reduction since that date is not of consequence enough

to be worth considering with reference to the present question.

All these outstanding bonds contain on their face this statement, placed there under the mandate of the statute:

"The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority."

See copy of letter, &c., from the Treasury Department in the *Appendix* to this brief.

The Refunding Act of July 14, 1870, under which these outstanding bonds to the amount of upwards of \$570,000,000 were issued, contains, in its first section, the following provision, viz.:

"That the Secretary of the Treasury is hereby authorized to issue, in a sum or sums not exceeding in the aggregate two hundred million dollars, coupon or registered bonds of the United States, in such form as he may prescribe, and of denominations of fifty dollars, or some multiple of that sum, redeemable in coin of the present standard value, at the pleasure of the United States, after ten years from the date of their issue, and bearing interest, payable semiannually in such coin, at the rate of five per cent. per annum; also a sum or sums not exceeding in the aggregate three hundred million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after fifteen years from the date of their issue, and bearing interest at the rate of four and a half per cent. per annum; also a sum or sums not exceeding in the aggregate one thousand million dollars of like bonds, the same in all respects, but payable at the pleasure of the United States, after thirty years from the date of their issue, and bearing interest at the rate of four per cent. per annum; all of which said several classes of bonds and the interest thereon shall be exempt from the

payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority; and the said bonds shall have set forth and expressed upon their face the above specified conditions, and shall, with their coupons, be made payable at the treasury of the United States. But nothing in this act, or in any other law now in force, shall be construed to authorize any increase whatever of the bonded debt of the United States."

16 Sts. at Large, 272.

The Resumption Act of January 14, 1875, the outstanding bonds under which amount to upwards of \$257,000,000, provides as follows:

"Sec. 3. * * * And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the treasury not otherwise appropriated, and to *issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the Act of Congress approved, July fourteenth, eighteen hundred and seventy, entitled 'An act to authorize the refunding of the national debt,' with like qualities, privileges and exemptions*, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed."

18 Sts. at Large, 296.

The War Revenue Act of 1898 does not in terms refer to the exemption provision in the Refunding Act of 1870, but it *contains an independent provision on the subject in substantially the same language* as that of the Refunding Act, viz.:

"And the bonds herein authorized shall be *exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority.*"

30 Sts. at Large, 467, § 33.

This Act of 1898 differs, however, from the former acts in that it does not make it mandatory upon the officials that this exemption shall be declared upon the face of the bonds. Nevertheless, the Treasury Department (See letter in *Appendix*), as an executive act construing the statute, *has printed precisely the same contract of exemption on the face of these bonds as in the case of all other outstanding bonds.*

From the foregoing statement it will be perceived that the question at issue can appropriately be discussed and disposed of as to all the outstanding United States bonds, as if they had all been issued under the Refunding Act of 1870, there being no material difference between it and the subsequent acts so far as respects the nature and extent of the exemption.

We understand that some reference has been made to Section 3701 of the Revised Statutes, which *declares, generally, the exemption (it would exist independently thereof) of all government obligations from State, local and municipal taxation.* We may say, once and for all, that the provisions of the Revised Statutes have nothing whatsoever to do with this question under discussion, nor do they refer in any way thereto.

The statutes authorizing the outstanding bonds are *special acts, temporary in their nature*, passed for the *specific purpose* of authorizing and providing for these issues of bonds, to mature *within a limited number of years.* They are not laws in the ordinary sense, binding on all citizens in respect to rights, duties, or remedies, but are rather *special acts, conferring authority merely on the Secretary of the Treasury to do the specific and temporary thing described, that is to say, to borrow certain specified amounts on the faith and credit of the United States, for the times, and on the terms, prescribed therein.* They do not differ in form and effect from a statute authorizing the borrowing of

money to build a fort or a post office, and the issuance of bonds therefor.

The Revised Statutes of the United States, on the other hand, embrace only those statutes of the United States which are "*general and permanent* in their nature."

U. S. Rev. Stat., § 5595.

The latter have really little more bearing upon the statutes authorizing the issues of these bonds, and the bonds themselves, than has the Code Napoleon. These special and temporary authorizing statutes are complete in themselves, and contain all of the provisions of law applicable to the form and issue of the bonds.

The Resumption Act of 1875, *referring to the Refunding Act of 1870, as an existing statute*, was passed long after the Revised Statutes, and under both of those acts the Treasury Department has, from year to year and day to day, for nearly a quarter of a century, been regularly issuing bonds with these clauses of exemption.

Of course, it cannot be contended for a moment that, under these circumstances, the Revised Statutes in any respect repealed or affected the Refunding Act—which must have been thereby repealed as a whole, if at all—upon the continuous existence of which act, the larger part of the outstanding bonds are now absolutely dependent for their life and value. The Revision has no more to do with these statutes than it has with the supposed special act as to a post office or fort, to which we have referred.

Proceeding, then, with the discussion on the basis that all of the outstanding bonds are controlled by the same exemption as that found in the Refunding Act (and that is the fact), we think it will be convenient to introduce in this place a copy of the form of the bonds issued under the Refunding Act of 1870—the others are substantially like this—and we,

therefore, give it as follows (See Treasury Statement in *Appendix*):

"Four per cent loan of 1907, consols.

(Face of bond.)

1877

1907. M

FOUR PER CENT CONSOLS OF THE
UNITED STATES.

A 4

Washington, July 1st, 1877.

Principal and interest payable in coin
One M Thousand
at the Treasury of
the United States.

THE UNITED STATES OF AMERICA

Are indebted to.....or assigns, in the sum of One Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870," amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Transferable on the books of this Office.*

Date of issue.....

Entered.....

Recorded.....

Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January
20th, 1871.

Transfer (NO.....).

Original Date.... Original No.....

1000. FOUR PER CENT. CONSOLS. 1877-1907.

For value received,*assign to*.....
the within registered bond of the United
States, and hereby authorize *the transfer*
thereof on the books of the Treasury Depart-
ment.

Dated, 18..

State of, County of,
Town of

Personally appeared before me the above
named *assignor*, known or proved to me to
be the.....payee of the within bond, and
signed the above *transfer*, acknowledging the
same to be his free act or deed.

Witness my hand, official designation, and
seal.

NOTE.—The execution and acknowledgment
of the above assignment, when not made at
the Treasury Department, must be before a
U. S. judge, U. S. district attorney, clerk of
a U. S. court, collector of customs, collector
or assessor of internal revenue, U. S. Treas-
urer or Assistant Treasurer, or the president
or cashier of a national bank, or, if in a
foreign country, before a U. S. minister or
consul. In all cases the officer must add his
official designation, residence, and seal if he
has one. When the *assignment* is made by
a corporation, it must be named as the as-
signor; when by a guardian, *trustee, executor,*
administrator, an officer of a corporation, or
anyone in a representative capacity, proof of
his authority to act must be produced to the
officer before whom the *assignment* is made
and must accompany the bond. *Assignors*
must be identified as known and responsible
persons to the satisfaction of the officer.

One Thousand."

Upon the foregoing statement, it is indisputable that the provision in question, so far as respects the taxing power of the United States, is an exemption, not merely from *direct* taxation, but from *all indirect* taxation as well.

Under the Constitution of the United States, the taxes which the Federal Government is authorized to impose are divided into two great classes, to be imposed upon entirely different bases, viz., direct taxes, to be laid under the rule of apportionment between the States in proportion to population, and indirect taxes, which must be imposed upon the basis of uniformity throughout the nation, which two bases are radically different in their application, inasmuch as direct taxation, by the rule of apportionment between the States according to population, necessarily precludes the uniformity throughout the nation, in respect of the burden upon individual tax payers, which is required for indirect taxation; so that no one tax can belong to *both* classes, direct and indirect.

By the Constitution "duties, imposts and excises" are unquestionably described as indirect taxes, being required to be laid by the rule of uniformity.

The general *grant of the taxing power* is to "levy and collect *taxes, duties, imposts and excises.*"

In the *same clause* is the provision for uniformity in respect of *duties, imposts and excises*, but there is *no provision in that section* in respect to the rule for imposing *other taxes*. Doubtless this was because the Constitution had *elsewhere* provided the rule of apportionment for direct taxes, and doubtless it was supposed that all taxes would fall within one or the other of the two classes, regulation of which had been thus provided for, the chief Federal taxation to be, however, *indirect*.

Pollock v. Farmers' Loan & Trust Co.
(*Rehearing*), 158 U. S. at pp. 617-18,
621-22.

There has been, at times, more or less speculative discussion as to the possibility of the imposition of some tax which would not fall within either of the two great classes, but we think we may say with confidence that in the period of one hundred and ten years since the Constitution went into operation, no such imaginary possible tax, belonging to neither class, has been discovered and defined.

The exemption in question being, in the word first used in it—"taxes"—as broad as the word "*taxes*" used by the Constitution in its grant of the *taxing power*, would, under ordinary construction of language and according to natural and common understanding, be understood by investors to embrace exemption from all United States taxes whatsoever, whether direct or indirect, and so, we submit, it ought to be regarded in the construction of this act.

But the act and the bonds do not leave the matter to this alone. The declared exemption is from "*all taxes or duties*," and "*duties*" are indisputably in the class of *indirect* taxes. Indeed, the representatives of the Government are under the necessity of claiming that this is an indirect tax, inasmuch as, if a direct tax, it would indisputably be void, because not laid by the rule of apportionment.

The exemption in question, held out to investors whom the Government desired to attract, by way of inducement to them to make the investment, exhibits in its language an intent to create the exemption in broad, general and comprehensive terms.

Authorized Federal taxation being authoritatively divided into two great classes, and it being of course so understood by Congress, a *declared exemption from both the classes of tax* should be regarded as embracing, in the view of Congress, an exemption from *all Federal taxation whatsoever*.

In respect of taxation by the States, of course, varying from each other in respect of methods and classes of taxes, and subject to subsequent variation indefinitely, no such form or method of declaring the exemption could be used. And, consequently, in re-

spect of the States, the exemption was declared to be from taxation "*in any form*" by or under their authority.

Under the circumstances and in view of the manifest intention of the act to hold out this exemption from taxation by way of inducement to investors, we submit that there is no just ground to suppose or believe *otherwise than* that it was the intent of the act to make the exemption from Federal taxation *as broad, sweeping and comprehensive as the exemption from State taxation.*

So far as our researches have extended, the only case *in this Court* touching directly the question of United States legacy, succession or inheritance taxes is *Scholey v. Rew*, 23 Wall., 331—which case, we think, has been claimed, and by some regarded, as being extremely adverse to the side of this question which we are endeavoring to maintain. We think, on the contrary, that it is not adverse to us, but, when correctly understood, rather an authority in our favor.

That case arose under the succession and inheritance tax provision of the Act of 1864, as amended in 1866, and was dependent on the inherent powers of Congress in respect of taxation of such character, not qualified by any exceptions created or declared by itself. The tax was claimed by reason of the passing of property by will from a wife to her husband. The first material point of inquiry was whether the property was to be regarded, with reference to the tax claimed, as real estate or in legal effect as personal estate, it being real estate which had been purchased and paid for by Trustees with funds derived from personalty—the materiality of this point arising from the circumstances, that the United States taxing statute exempted personalty passing by will from wife to husband, but did not exempt real estate so passing. The decision was, that it was to be regarded as *real estate* for the purpose in question.

On that basis the tax was claimed to be invalid,

as being a direct tax, not imposed under the rule of apportionment, as the Constitution requires direct taxes to be. The *decision* was, that it was *not a direct tax, but an indirect tax* on the passing or transfer of the property in or by this particular manner or means, and that, the rule requiring apportionment not being applicable to indirect taxes, the tax was valid.

It is true that the Court in its opinion chose to call it an excise tax *or duty*, but it was quite immaterial for any practical purpose, what particular kind of indirect tax it was or shou'd be called. We think it clear that the Court *might with at least equal propriety have called it a "duty"* merely. *That was the name given to it by the Act of 1864, and that is the name given by Congress in the War Revenue Act of 1898*, the construction of which is here in question, to the taxes of this character, *viz.*, upon or in respect of legacies and distributive shares of personal property, which that act imposes, or purports to impose.

By reference to that portion of the act of 1898, Section 29, it will be seen that when first designating it by name, it calls it a "*duty or tax*"; then in prescribing certain rates, with reference to degrees of kindred, &c., &c., it says the "*tax*" shall be at such and such rates. Then it provides that all legacies on property passing from husband to wife shall be exempt from the "*tax or duty*." And then, in the final clause graduating the tax with reference to amount of property, prescribing four different rates, it provides that where the amount or value shall exceed \$25,000, but not exceed \$100,000, the rates of "*duty or tax*" previously set forth shall be multiplied by one and a half, and *then* in fixing the final graduated rates, increasing progressively, with the increases in amount of property, it provides that *such rates of "duty"* (that word "*duty*" here standing alone, not coupled with the word tax or with any other word) shall be multiplied, by two, by two and a half, by three, respectively, and nowhere in

this act is the word "excise" used at all in relation to this subject-matter.

As there is found in all the acts under which the outstanding bonds of the United States were issued, and likewise on the face of the bonds, an express exemption from "duties" of the United States, it is necessary for our adversaries, in order to maintain their contention here, to establish, first, that the word "duties," as thus used in the declaration of exemption, does not embrace exemption from such taxation as the War Revenue Act of 1898 imposes upon legacies and distributive shares of personalty, and, secondly, that that act was *designed to and does*, in the merely *general language* which it uses, *without at all mentioning United States bonds*, impose such burthen of taxation upon or in respect of them, notwithstanding the exemption for which the Government has plighted its faith to the original lender of the money for which the bonds were issued *and to their successors in interest and "assigns,"* as holders of the bonds, thus repudiating the original loan.

It seems to us that this must be to our adversaries an extremely difficult and indeed impossible task, especially in view of the circumstance that the Act of 1898, which is claimed to have imposed this tax, expressly designates the tax which it imposes as a "*duty*." But we must not forget that we have the judgment of the Court below (even though *pro forma*, in effect) against us, nor can we lose sight of the very great importance of the question, as well in principle as in respect of the great amount of money involved in the determination, having regard to its practical application, presently and *ultimately*, and we therefore proceed to the discussion much more elaborately than would seem to us to be demanded by any intrinsic difficulty in the case, or doubt as to what the decision should be.

The taxes imposed by our Government upon the importation of goods from abroad are now in common parlance, and perhaps ordinarily in statutes,

called duties—sometimes customs duties or customs—but unquestionably the general term “duties,” is not and never has been *confined* to duties on *imports*. It embraces other taxes belonging to internal revenue.

Returning to this particular case or question, may we not justly say that any assumption that this particular exemption from “*all*” United States “*duties*” granted to the original lenders of money to the United States upon these bonds and to their successors in interest as bondholders, was designed or intended for the purpose of protecting such lenders or bondholders *as such*, from being subjected to the burthen of duties on *imports*, would be merely absurd? We do not imagine that any such proposition will be asserted by the representatives of the Government. If it should be, we think we might safely, without argument, leave the proposition to fall by its own weight.

We assume, therefore, that this exemption covers “*duties*” of the *Internal Revenue* class, and we take it to be quite clear (irrespective of the advantage in the argument which we derive from the circumstance that the tax here in question is *described as a “DUTY” in the very act which is claimed to have imposed it*, and which we deem quite sufficient for our purpose) that any internal revenue tax, which, if there were no contracted exemption, would fall as a burthen upon these bondholders, may from its nature be properly classed as a “duty” within the intent and meaning of the contracted exemption. If it may properly be called an excise, it is an *excise duty* or *duty of excise*.

The subject of “Duties, Imposts and Excises,” as these words are used in the Constitution of the United States, in regard to their nature and extent respectively, and the lines of discrimination between them, so far as they clearly exist without running into each other, is, we think, one of some complexity and uncertainty, and we think it not inappropriate to state here some general views on the

subject which, we trust, may be found not substantially incorrect after the full scrutiny to which they are, of course, subject.

Proceeding thus to state such general views, we have to say:

The term "duties," as used in the Constitution, is a much larger and more comprehensive word than either of the words "imposts" and "excises" as used in that instrument, and is a general term, embracing, in fact, to a great extent, if not fully, both the more limited terms "imposts" and "excises."

The word "duties," as thus used, unquestionably embraces both taxes imposed upon importations from abroad and taxes for internal revenue.

The word "imposts" used in the Constitution is now seldom heard. It has almost if not entirely gone out of use. But at and about the time of the framing of the Constitution it was very much in vogue, and was then understood to refer mainly if not entirely to taxation on imports.

It is matter of history that in the interval between the close of the War of the Revolution and the framing of the Federal Constitution, there was an earnest and persistent, though not practically successful effort, on the part of the Continental Congress, to obtain from the States a grant of power to the Congress to lay taxes on imports, a power Congress did not at all possess, which power of taxation so sought was then commonly called "the impost."

For an account of this matter see McMaster's History of the People of the United States, Vol. 1, pp. 141 to 145-154-156-201-202-266-67-357-367-370.

And in the first article of the Constitution, near its close, we find the following provisions:

"No *tax or duty* shall be laid on articles exported from any State.

"No State shall without the consent of the Congress lay any *imposts or duties* on imports or exports except what may be absolutely necessary for executing its inspection laws.

"No State shall without the consent of Congress lay any *duty on tonnage*."

As showing that the term "duty," like the word "tax," is *generic*, the former referring to all classes of indirect taxes, Judge COOLEY's definitions are instructive. He says:

"Thus, the word *duty* is sometimes used in a general sense as synonymous with *tax*; but in common use it means an indirect tax, imposed on the importation, exportation or consumption of goods. The term *impost*, also, in its general sense, signifies any tax, tribute or *duty*; but it is seldom applied to any but the *indirect taxes*. *Customs duties*, as the term is commonly used, are the *duties* levied upon imports and exports, while *excise duties* are *inland imposts*, levied upon articles of manufacture and sale, upon licenses to pursue certain trades or deal in certain commodities, upon special privileges, etc."

Cooley on Taxation (2nd Ed.), 3.

As this Court has heretofore said, after quoting the foregoing definitions:

"In the Constitution, the words '*duties, imposts and excises*' are put in *antithesis* to *direct taxes*."

Pollock v. Farmers' Loan and Trust Co. (Rehearing), 158 U. S., at p. 622.

In support of our statement that the word "duty" is a general term of large import, comprehending many more limited or special kinds of tax, we refer to the article entitled "Taxation" in the Encyclopædia Britannica, containing in nearly forty pages an elaborate discussion of that subject under different headings, including the following, viz.: "*Excise duties*," "*Customs duties* or duties on the importation and exportation of commodities," "*Stamp and Legacy duties*," "*Duties on Successions* or on the transfer of property from the dead to the living."

Although the word "impost" in this connection has thus practically gone out of use, and been superseded by the words "duties," or "customs," or "customs duties," used to its exclusion, instead of concurrently with it as formerly, the word "excise" has, in the period that has elapsed since the adoption of the Constitution, come to be used in common parlance, and to some extent in legal proceedings and acts, more extensively and with wider scope, and as applicable to more numerous subjects, than at the time of such adoption, but we think that in most, if not all, the instances of application of the term "excise" to new subjects, it has been rather concurrently with, than to the exclusion of, the old term "duties," in respect of such subjects.

We think that the popular idea or understanding in relation to excises originally and for a long time was, that they were taxes imposed upon or in respect of liquors or their production or sale or consumption, and that this idea still, to a considerable extent, prevails, and is acted on; but doubtless it is now a long time since this term "excise" came to be applied, at least for legal purposes and in legal proceedings, to and in respect of other subjects than liquor. And yet the memorable insurrection in Western Pennsylvania, which was so extensive and violent that it became necessary to call out a large military force to quell it, was consequent upon dissatisfaction with the taxing of whiskey by the United States under what was called the *excise* law, and in the State of New York we still apply that term "excise" to legal regulations and legal officials and their acts, relating to liquor.

We have now to make this observation, *viz.* --This act of 1898, which in the 29th section imposes the tax in question, provides in the 33d section for a *new loan* not exceeding \$400,000,000, upon United States three per cent. bonds, and in that section makes the following declaration:

"and the bonds herein authorized shall be *exempt from all taxes or duties of the United*

States, as well as from taxation in any form by or under State, municipal or local authority."

We submit that it is entirely clear that the three per cent. bonds issued under this 33d section which, to the amount of \$198,679,000, are now outstanding, *are clearly not subject to the tax or duty imposed by the 29th section.*

As to this point, the situation is, that the 29th section imposes this "tax or duty"—or the "duty" pure and simple—upon legacies or distributive shares of personalty passing by will or upon intestacy, according to the amount or value of the property so passing, *this burthen of taxation being thus imposed, upon property so passing, in general terms merely, without any discrimination or specification, by way of either exclusion or inclusion or otherwise, in respect of the different kinds of property.* The subsequent section creates *an exemption from this tax or duty in favor of certain specified property, viz., the United States bonds issued under such subsequent section,* which were liable so to pass, and altogether likely so to pass, to a great aggregate extent, upon the death of the owners.

If this exemption of particular property were contained in the same section which imposed the tax or duty upon property generally, it would seem to be too clear for dispute that the exemption effectually shielded the particular property from subjection to the tax or duty provided by the act for the ordinary and general mass of property. Surely, it can make no difference, for legal purposes or in legal effect, whether the general imposition of the tax and the special exemption of the particular property therefrom are contained in the same section or in different sections of the act, nor can it make any difference in legal effect, in this respect, that the exemption contained in this later section embraces within its scope and effect all other taxes or duties of the United States, as well as the tax or duty im-

posed upon property in general terms by the preceding section.

The operative exemption declared is from "*all*" taxes or duties of the United States, and certainly this is an adequate shield against the particular tax or duty before mentioned in this act, unless the general rule or principle, that the greater includes the less, is to be in this instance disregarded.

In this connection, it is to be borne in mind that it was needful that the Government should make the exemption of these three per cent. bonds from taxation as broad as it is, *in order to avoid placing them on a much less favorable basis in this respect than the other United States bonds then outstanding, all of which had such exemptions* from all Federal and State taxation, expressed in like language, and all of which exemptions of the outstanding bonds, prior to the three per cents., were contained in special clauses of exemption set forth in the particular acts under which such bonds were issued, and limited in express terms to the bonds issued under that particular statute. There is not, and never has been, any general act exempting United States bonds, *in general*, issued or to be issued, from taxation by the United States.

It may be assumed, as we think justly, that, by reason of the exemption of the three per cent. bonds issued under the Act of 1898 from liability for the tax or duty upon legacies and distributive shares of property, by force of the exemption clause contained in that Act, all the other then outstanding bonds of the United States, issued under former acts, have the like exemption from liability for the tax or duty imposed by the Act of 1898 upon legacies and distributive shares of *property generally*, inasmuch as all these other outstanding bonds have, in virtue of the law under which they were issued, the same exemption from *all* taxes and duties of the United States, expressed in language similar to the clause in the Act of 1898, exempting the three per cent. bonds issued under it from taxation.

We return now to the discussion of the more interesting and more ultimately important question, as to the right and power of the United States to impose taxes or duties, of the character of the tax or duty now in question here, upon or in respect of the outstanding United States bonds, which have, in virtue of the law of their issue and of the express terms of the bonds, such exemption from United States taxation as has been heretofore mentioned in detail.

We enter upon the discussion with reference primarily to the Refunding Act of July 14, 1870, as a basis for determining the question at issue, inasmuch as that is the pattern act, after which, so far as respects the terms of exemption, these other acts were framed—we believe in every instance in precisely the same language, or clearly to the same effect,* as in the Act of 1870—and we assume that if we establish the exemption we claim as existing and applicable in respect of the bonds issued under the Act of 1870, there can be no ground for denying that all the other outstanding bonds have the like exemption.

Proceeding with the discussion upon this basis, we desire, in the first place, to call the attention of the Court to the circumstances under which, and the purposes for which, the bonds under the Act of July 14, 1870, were issued, and the exemption in respect thereof was declared and granted, and notified to whom it might concern—as matters affecting the general rules and principles upon which, and the spirit in which, that act, and especially the exemption clause of it, should properly be considered and construed—of which circumstances and purposes, we assume the Court will take judicial notice, they being of a public nature and matter of general public information, and in great part appearing by reference to, and consideration of, statutes and things public.

The scheme of this Act of July 14, 1870, was for the borrowing by the Government, upon the bonds authorized by it, of an aggregate amount of fifteen

hundred millions, not at all for the purpose of providing for new expenditures, but solely for the purpose of taking up, with the money thus borrowed, bonds of the United States then outstanding, it being an express provision of the act that the total amount of the Government bonded debt should not be increased by this new borrowing.

By this scheme, one thousand millions, or less, was designed to be borrowed upon thirty year bonds, bearing interest at the rate of four per cent., which was a rate of interest then unprecedently low for the bonds of this Government—the lowest rate of interest upon any of its bonds then outstanding being five per cent., while upon a very large amount of the then outstanding bonds the rate was six per cent. We are not able to say at this moment whether the Government had *ever* before this time been able to obtain loans at a less rate than five per cent, not having had time to investigate that matter thoroughly within the short time allowed to file this intervening brief, but we feel quite confident that, if there was any such borrowing at a lower rate than five per cent., it must have been very long before this refunding scheme of 1870.

Among the bonds designed to be taken up and practically replaced at a lower rate of interest, by means of the borrowing on the new bonds provided for by this act, were a very large amount of five-twenty bonds, so-called, bearing interest at the rate of six per cent., which were payable in twenty years, with the optional privilege to the Government of calling them in and paying them off at par at any time after five years, and a very large amount of ten-forty bonds, so called, bearing interest at the rate of five per cent., payable in forty years, with the optional privilege to the Government of calling them in and paying them off at par at any time after ten years.

The six per cent. bonds of 1880 and 1881, outstanding at the time of the passage of this refunding

act, were not accompanied by any optional right of paying them off before maturity.

Of course, the saving or gain to the Government, by practically substituting these four per cent. bonds for outstanding five per cent. bonds, would be at the rate of one per cent. per year, and in so far as there was such practical substitution of four per cents. for six per cents., the annual saving or gain, for the time the old bonds had to run, would be at a much higher rate. We need not enter into any close calculations on this subject. Suffice it to say, that a difference at the rate of one per cent. a year upon the seven hundred millions of new four per cents., between that low rate, and the rate of five per cent., which was the lowest rate borne by any of the bonds outstanding at the time of this refunding act, would be seven million dollars annually, amounting, in the thirty years the new four per cent. bonds had to run, to two hundred and ten millions.

It is too plain for dispute that the Government, while greatly desiring to attain this reduction of its annual interest charge, appreciated the difficulty of doing so, and felt the necessity of offering some new and substantial advantage to money lenders or investors in order to induce them to purchase at par the new bonds bearing this unprecedently low rate of interest, and that *this exemption from taxation was proffered by the Government as such inducement*—it being directed that it should be *set forth on the face of the bonds*.

This exemption was devised and established by the Government, of its own head and *merely for its own sake and for its own benefit and advantage*, it being intended to operate by way of inducement as above stated, and it was *not at all for the sake of, or as an act of favoritism to, the lenders or investors*, who might be thus induced to lend the money, or become takers or holders of the bonds, though, of course, it was intended that the bondholders, after they had been induced to invest in the bonds because and in consideration of the ad-

vantage proffered to them in and by this exemption, should be entitled to have and enjoy the benefit of such exemption.

And in order that this exemption, thus proffered, should have the effect, by way of inducement to lenders and investors, for which it was designed and created, it was carefully provided by the statute establishing the exemption, as we have seen, that it should be brought to the notice of investors and would-be investors by means of the *statement of it on the face of the bonds*, directed to be inserted by the statute, which purpose was accomplished, and the exemption thus actually brought to the knowledge of, and relied on, by the parties who became investors. And this was none the less so in those cases, in which the bonds were sold in large blocks or quantities to bankers or large dealers in such securities, who buy, not to hold for themselves as investors, but with intent to sell again, and whose willingness thus to buy, and the price they can afford to pay, are dependent upon their ability to find purchasers for actual investment, and the price obtainable from such investors.

As well in case of the large sales in blocks to bankers and dealers as in the case of employing such parties to sell directly as agents of the Government, in consideration of a commission paid to them, the position of such bankers and dealers is, practically, merely intermediary between the Government and the investor who buys for permanent holding, who is in real substance the original lender.

In the course of the execution of the Government's scheme for borrowing money upon these bonds at the low rate of four per cent. theretofore unprecedented, these bonds, bearing upon their face the Government's express declaration of exemption from both Federal and State taxation, in the very broad, general and comprehensive terms which were employed, were scattered broadcast over this

country and in Europe, and ultimately the scheme was made successful.

But it is manifest that this was an extremely difficult task, and that the Government understood it to be so, and perfectly understood that this assurance to the original bondholder and his successors in interest, against the burthen of any taxation, whether Federal or State, must be and was an essential part of the scheme for borrowing at this reduced rate, without which the scheme could not be accomplished.

For some years *before this scheme was devised, the Government*, assuming that it had the like power and right to tax its own bonds as to tax other property, *had proceeded, in exercise of such right, to levy and collect taxes upon the income of such bonds.*

By the Act of July 1, 1862 (12 Sts. at Large, 474), it imposed a tax upon the interest on United States bonds at one-half the rate of the tax imposed upon the income derived from other property, but by the Act of June 30, 1864 (13 Sts. at Large, 281 and 479), this discrimination in favor of the holders of United States bonds was abandoned, and the interest on them was taxed at the like rates as other income.

In short, *whenever Congress had intended to tax obligations of the Government, it has done so in express terms, and has left nothing to implication.* On turning to the War Revenue Act of 1898, we do not find a word on the subject, and the alleged taxation of the bonds becomes purely a matter of *unauthorized inference* based upon the use of the general words "*personal property.*" Indeed, it may fairly be presumed that, had it not been for the well-understood haste, on the verge of the war, with which that act was prepared, these bonds would have been *expressly exempted* from its provisions. Such an exemption, however, would have had no greater force or effect than the express exemption in the bonds themselves and the authorizing statutes.

Yet so difficult was the task of inducing investors

in United States bonds to accept this reduced rate of four per cent., one-fifth lower than the lowest previous rate, even with the proffered complete exemption from taxation, that it was not until about seven years after the enactment of this Refunding Act that the Government was enabled to "market" or sell any of these four per cent. bonds.

A provision of this Refunding Act required that these four per cent. bonds should be payable at a period not longer than thirty years from the date of their issue. The earliest issue of any of them cannot have been prior to July 1, 1877, as they are all made payable on July 1, 1907, being commonly known as the United States four per cent. bonds of 1907, and on the specimen form of them, in the *Appendix*, will be found the figures 1877-1907.

Notwithstanding their uniformity of date and time of maturity, they were actually issued at many different times, and many of them long subsequently to July, 1877.

It is too plain for dispute, that the exemption thus created and notified to lenders and intending lenders of money to the Government by means of purchasing the bonds, by way of inducement to them so to purchase, was an essential and important part of the contract between them and the Government, and that in accepting the very low rate of interest which was proposed to them, and making the loan or purchasing the bonds at that low rate, in reliance upon and because of such exemption, they paid to the Government *a full valuable consideration for the grant and assurance to them of such exemption.*

The grant of such exemption, under such circumstances, was in no wise against the interest of the Government at that time, but was *in and for its direct pecuniary interest.*

It was so intended and has so operated, and if in truth there be (as we think there is not) any room for doubt as to the construction of the exemption, in respect of scope, extent or effect, we submit

that such construction must be upon the basis of treating the bondholders, not as grantees by way of favor or voluntary concession, but as *purchasers of the exemption for valuable and full consideration.*

There are certain authorities laying down the rule or principle that a certain species of public grants, or grants by the sovereign, of rights, privileges or franchises, are to be construed with strictness, so that the grantee shall not be allowed to take under them more than is clearly granted, and that implications in his favor are not to be indulged, but we think it has now come to be well settled that this rule or principle must not be carried to the extent of excluding anything which, upon fair and reasonable construction, appears to have been intended to be granted, nor even to exclude reasonable implications, when they appear to be needful in order to effectuate the actual intent.

Charles River Bridge v. Warren Bridge, 11 Pet., 420, 549, 556-7; s. c., 7 Pick., 344, 462.

The Binghampton Bridge, 3 Wall., 51, 74-75.

And it likewise appears to be well settled that the rule or principle of strictness in construction, which is above referred to, does not at all apply to grants for adequate valuable consideration.

Charles River Bridge v. Warren Bridge, 11 Pet., at pp. 557 and 589.

Langdon v. Mayor, etc., of N. Y., 93 N. Y., 129, 144-147, and authorities cited.

We have shown above that, practically, the grant or concession of the exemption in question was, as respects the grantee or promisee, a purchase by him, for valuable and adequate consideration, and thus we think we may safely say that the principle of strictness in construction above referred to has no application in this case.

In this connection, we desire to call attention to, and claim the benefit of, two general rules of construction, applicable in ordinary transactions between individuals, which are entirely familiar, so that we need not cite authorities in relation to them; one is, the rule, that, in a grant, words used by the grantor shall ordinarily be construed most strongly against him and in favor of the grantee; and the other is, that, in ordinary bargains, agreements and transactions between individuals, words used, which are distinctly the language of one party, are to be construed most strongly against him and in favor of the other party, and especially so in cases where the language thus used has been originated and framed wholly by the party using it, without conference at all with the other party, and then communicated to such other party as part of a proposal for his assent to, and execution of the agreement, and upon such proposal has been assented to and acted upon by such other party in consummating the agreement.

We have presented in this case a very strong and striking case for the application of this rule or principle to the fullest extent. This scheme of exemption was originated by the Government, the language in which it was expressed in the Act of Congress, and on the face of the bonds, was framed by the Government, without any conference whatever with any of the bondholders, and was then communicated to the takers of this \$700,000,000 loan as a basis upon which they were invited to accept the exceptionally low rate of interest of four per cent., and it was upon that basis, thus accepted by the bondholders, that the \$700,000,000 was borrowed by the Government from the takers of this loan.

The general rule that, in such a case, the language must be construed most strongly as against the party employing it, is, as we have seen, as applicable to such an ordinary contract of the Government, on valuable consideration moving from the

other party, as to a contract between private individuals.

Garrison v. U. S., 7 Wall., 688.

II.

Further observations on this general subject, with special reference to the necessary construction and legal effect to be given to this express exemption.

We now desire to present, by way of argument, certain propositions upon the question of the true construction of the exemption clause in question.

First.

Unquestionably this bond is a contract. Who are the parties to that contract? On the one side, is the United States; on the other, the bondholder whose name is inserted in the bond, "*or assigns.*" It certainly is not a contract with any one else. The bond declares, in substantial pursuance of the statute, an exemption of the principal and interest from the "payment of all taxes or duties of the United States" as well as from State taxation. In whose favor is this exemption created—to whom does the Government pledge its faith for its due observance? Certainly, the bondholder and his "*assigns,*" and no one else.

We suppose that, possibly, it may be claimed on behalf of the Government that this is an exemption of the bond, merely, and not of the parties in interest. Must not any such claim be an absurdity? Can it possibly be intended that this was a promise to the inanimate thing, the bond? It may be noted that the language of the statute in regard to the exemption differs slightly in mere form, though not in substance, from that which the offi-

cials of the Treasury Department have inserted in the bond as in execution of the mandate of the statute. The statute is that the "bonds and the interest" thereon shall be exempted from the "payment of all taxes or duties of the United States" as well as from State taxation, and that the said bonds shall have "set forth and expressed upon their face the above specified conditions." In execution of this mandate, the Treasury officials have inserted in the bond the declaration that "the principal and interest" are so exempt. That is the practical construction which every Secretary of the Treasury has placed upon this exemption clause of the act from the time when the issue of bonds first began until the present time; and, as these bonds are constantly being reissued to new holders, as transfers are made from time to time, probably not one business day has passed in the Treasury Department within the last twenty years in which bonds containing this statement of exemption, in the language we have quoted, have not been issued by the Department. Can it possibly be said that the language used by the Treasury, as in execution of this mandate of the statute, was in any sense a departure from the true intent and meaning of the act itself? That the answer to this must be in the negative, appears to us to be too plain to make it worth while to spend any time in argument about it.

Now, what is the thing that is exempted from taxation by this Act and this declaration on the face of the bonds? It is not the paper writing, the mere bond. In its essence and substance, it is an exemption of the *indebtedness* of the United States which is evidenced and represented by the bond. If the bond were accidentally destroyed by fire or otherwise without fault of the holder, the indebtedness would remain in full force, and it cannot fairly be doubted that in such case the exemption would as completely apply to the indebtedness, the evidence of which had thus been lost, as it applied before such loss or destruction of the paper evidencing the indebtedness.

Second.

Upon the face of the bond, the obligation of the Government for the payment of the indebtedness and the interest upon it, runs to the original registered owner, whose name is stated in the bond, and to his "*assigns*."

Unquestionably, this statement, making it run to the "*assigns*," was not an improper act by the Secretary of the Treasury in framing the form of the bond. Who ever heard of a Government loan, or any other loan of money for a long term, which was not made assignable? If not so assignable, certainly the loan could not have been practically negotiated, and, as we have observed before, this form of bond has been practically in use by the Treasury Department from the beginning of the issue of bonds to the present time, and that practical construction could not now be challenged by the Government, if there were otherwise any possible foundation for such a challenge, as we think there clearly is not.

Now, who are the assigns entitled to the benefit of this contract? Unquestionably, the word "*assigns*" here used *covers assigns by operation of law as well as assigns by ordinary deed or act of transfer*. It covers a transfer by the owner in his lifetime. It covers the transfer by him by deed, operative upon his death and not before. *It covers a transfer by his personal representatives, that is to say, an executor or administrator, and unquestionably it was, and it has always been, so understood*. The last clause of the bond declares it to be "*transferable on the books of this office*."

Upon reference to the form of the bonds issued for the \$700,000,000, which we have above given, it will be seen that the *Treasury officials* have placed upon the back of it a form of transfer in case one should be made, and in the *directions in relation to such transfer* thus placed on the back of the bonds,

will be found a provision as to what shall be done when the assignment is made "by * * * a guardian, trustee, executor, administrator * * * or anyone in a representative capacity."

It has been customary to put directions of precisely this kind upon the back of the bonds since 1847, as appears from a copy of a letter from the Register of the Treasury to Mr. Carlisle, dated February 25, 1896, which is printed in the *Appendix* to this brief. Can it be supposed that it was ever intended or imagined by any one, when the Government borrowed a thousand dollars upon such a bond for the term of thirty years, which it agreed to pay at the end of the time to the lender, or *his assigns*, and meanwhile to pay the interest quarterly, that upon the death of the lender the right to this principal and interest should fall in, or that the indebtedness should not be paid to the executor or administrator of the decedent, as being legally his assigns, in like manner as it would have been payable to the decedent, if he had lived; and so, that the Government should have the advantage of converting this thirty-year loan into a terminable annuity? We do not argue on this point, as such an assumption would be manifestly absurd.

Enough has been said to show, if it were necessary for that purpose to say anything, that the right to the *principal and interest* of this bond passes, and was by the Government understood and expected to pass, upon the death of its holder, to his executor or administrator, as an "assign," as completely as it would pass by an ordinary transfer made by the decedent during life. Certainly, the executor or administrator is an "assign," and therefore the bond, by its express terms, becomes an obligation of the Government to him.

In the face of the express exemption declared on the face of the bond, that the principal and interest are *exempt* from the "*payment*" of all taxes or duties of the United States, can it rightfully be claimed that the executor or administrator, who

thus becomes the direct creditor of the Government as "assign" of the original creditor, can be made subject to the payment of a tax or duty of the United States *for or in respect of the very act which lawfully and in all respects properly makes him an assign?*

By the terms of the bond, as it is written on its face, the principal and interest are exempt from the payment of *all* taxes or duties of the United States. Clearly, this exemption has by contract been granted to all lawful holders of those bonds who are lawfully "assigns" of the original creditor.

Now, the present claim is that this lawful "assign," instead of being *exempted from*, shall be *subject to* the payment of a tax upon and in respect of the lawful act by which he became assign, and such tax, if the right to impose it exists at all, has no limit in amount other than the will of the Government imposing it. Under certain circumstances of the decedent, in respect of kindred and amount of property possessed by him, this tax upon personal property passing by will, under the construction given to it by the Commissioner of Internal Revenue, may extend to *fifteen per cent.* upon the principal; but there is nothing except the forbearance of the Government to limit it to fifteen per cent. If the Government can impose such tax at all, it may make it, if it chooses, twenty five per cent, fifty per cent., or ninety-nine per cent. But if we suppose it to be raised to no more than twenty-five per cent. and that deaths occur as many as four times prior to the maturity of the bond, the Government might thus tax away from the creditor the whole amount of money which was originally borrowed, without paying a stiver of it. Is that the construction which this bond properly bears? When it was offered for purchase to an investor, either in this country or in Europe, who read the terms of the exemption set forth upon the face of the bond, as it was intended he should do, and for the purpose of the reading and understanding of which by him the law made

it mandatory that its executive officer should put the statement upon the face of the bond, could it ever have occurred to him, that this mode of paying the money which the Government borrowed, by taking it back to itself under this form of taxation, could be exercised in the face of the pledge under which he loaned it, that it should be wholly exempted from "*all taxes or duties*" of the United States?

Take the case of the holding of these bonds in large amount by an English capitalist, his dying, and the property (ancillary administration having been taken out in this country, where the bonds were found on deposit) passing to his legatee or next of kin, would not such legatee or next of kin receive with profound astonishment the intelligence that, notwithstanding the decedent had supposed he had made an investment exempt from all taxes or duties of the United States, the principal could be taken away by the United States in this manner; or that it could be so taken away to any extent? Indeed, before the days of the present *entente cordiale* between Englishmen and ourselves, which has lately come about, might not an Englishman of the old time under such circumstances have been tempted to make some uncomplimentary remarks in relation to such a performance upon its being brought to his notice?

We cannot fear that this Court will ever sustain any such proposition; and it must be recollected that the Congress of the United States have never taken any such ground. *There is nothing in the Act of 1898, under which this tax is claimed, indicating that any idea of imposing any tax upon United States bonds, which had a contract exemption from Federal taxation, was entertained by the lawmakers. On the contrary, there plainly appears on the face of the statute a non-intent in that respect, as we think we have before sufficiently shown.* We cannot believe that this Court will ever sustain any claim, on the part of the executive

officials of the Government, for the collection of such a tax on the exempted bonds. We are not here complaining of any of those officials for presenting the claim, and endeavoring to enforce it, and of course we have no idea of imputing blame to, or making personal criticism of, any of the law officers or counsel for endeavoring to sustain, as best they may, the claim in question after it has been brought into litigation, because, the amount being very large, they may fairly enough have supposed that it was their duty to make the attempt, but we think we may fairly say that it is not to the interest of this Government, either with regard to its own honor and good name, or even to its pecuniary interest in respect of possible occasion for obtaining future loans, that the claim should be sustained.

Now, the contention of our adversaries, if we understand it, is, as we have said, that we cannot successfully challenge this taxation, because they say the exemption is of the bond, and we are not the bond—in other words, that the exemption is granted to the inanimate thing.

That proposition appears to us to be so manifestly unsound that it is hardly worth while to answer it, yet we believe we have already done so.

Here certainly is a provision of exemption from the payment of all taxes. Surely, this is an exemption of the person who must pay the tax, if it is to be paid at all. The inanimate thing cannot pay it; that is very certain. If it is to be paid at all, it is to be paid by the executor or administrator, and *that is precisely what the section of the Act of 1898 imposing the tax requires*, if it requires this tax to be paid by anybody.

Third.

There can be no reasonable question of the proposition that this exemption clause cannot rightfully be construed inconsistently with what the bondholders were fairly entitled to understand to be the intent and meaning of the Government in the exemption clause, when it was proffered to them as an inducement to lend their money at an unprecedentedly low rate of interest.

The principal point at issue is whether, notwithstanding the contract exemption from all taxes and duties, the Government is entitled to impose this particular duty or tax. Protesting always that, so far as we can see, the mere fact that there is an express exemption from *all duties*, and that this is unquestionably a *duty*, is alone absolutely decisive of the question, and that any further argument on the subject is mere supererogation, we proceed at this particular place to call attention to certain circumstances which we think are sufficient to show that this particular burden of a duty, inevitably consequent upon death, could never have been anticipated by the bondholders when the loan was offered to them for acceptance.

As we have before said, the ultimate real lenders, other than such corporations as might choose to take the bonds, would naturally be, in the main, a class of persons putting their money in this loan, of long term and low rate, by way of permanent investment for the benefit of themselves and those who were to come after them—disregarding for this purpose the mere temporary holding of bonds by agents of the Government, or bankers and dealers acting as mere intermediaries in placing the loan in the hands of the real lenders. Naturally, such permanent investors would be persons no longer young; they would be persons who had lived long enough and done enough work in the world to have acquired property to sufficient extent to afford to take

such long-term investments at extremely low rates of interest. It may fairly be assumed that their average age would be rather over than under fifty, and that they would be tempted to accept this low rate of interest, if they accepted it at all, because of the assumed absolute certainty of the security and its absolute exemption from being in the least degree touched by taxation, while in the hands of themselves or in the hands of their families, for whose benefit, rather than for their own, they made the investment—making it in substance for all who should come after them. We all know that, in very large measure, the labor and toil with which men seek to acquire property and deal with it, is usually, especially in the later period of life, more for the benefit of their families than of themselves.

If we can imagine the actual lenders of this seven hundred millions to be assembled in one great concourse, and the invitation of the Government to lend their money on this promised exemption to be communicated to them by word of mouth, by some emissary of the Government in a place large enough and with a voice loud enough to be heard by them all, would they not naturally have understood from all that would naturally have been said by this emissary of the Government, speaking according to the spirit of the law providing for this loan, that, if they contented themselves with this unprecedentedly low rate of interest, they and those to come after them during this term of thirty years could “sleep o’ night’s” without fear of ever being touched by the tax gatherer, in any manner whatsoever, in respect to this investment.

Of such a body of men, each one of them would certainly know that he was liable at any moment to be called away from life, and they would all understand that in ordinary course, long before the thirty years had ended, more than one-half of them would have gone to their graves. Instead of a personal assembly of intending lenders and a verbal communication to them of the invitation to accept the

exemption as a basis for their loans—which would have been, of course, impracticable—there was adopted by the Government, *ex industria*, the method of communicating such invitation by placing the declaration of the exemption on the face of the bonds which the lenders were invited to accept. Of this, the natural effect and result was as above stated with reference to the imaginary communication by word of mouth.

Now, if, notwithstanding the broad general terms of exemption from all taxes and duties of the United States, it had been intended by the Government that these investments should be subject to this unlimited power to tax away from the families or other successors in interest, upon the death of the original lenders, such portion of the principal of this loan, by the way of a tax consequent upon death, as it might choose, of its own mere will, without any limit in amount, was it not incumbent upon the Government, if it had any such idea, to apprise the persons from whom they proposed to borrow the money of the existence of such an intent? If it can be supposed that there really was such an intent, might it not fairly be said that the concealment of such intent, though it might not be legally a fraud, would be unfair and *misleading*? Certainly, no such intention to mislead can be fairly imputed to the Government or any of its officers or representatives, as having existed when this loan was obtained. If, at that time, it had been intended to reserve the power to impose such a tax, notwithstanding the broad terms of the exemption, the concealment of such intent would have been morally wrongful. If it was not intended to reserve such power, there is no just ground or reason for allowing such tax to be imposed now, in disregard of the intent and understanding of both parties at the time, to the great profit of the Government and the great loss of the bondholders.

Fourth.

The language of this exemption is, as we have before said, that there shall be a complete exemption from "*all taxes or duties.*"

We understand it to be now claimed on behalf of the Government that this particular tax is some peculiar kind of thing, of such extraordinary nature that it is not covered by the contract exemption.

As to that, it may be said in the first place that there is an exemption from *all taxes* whatsoever, which term unquestionably embraces as well indirect as direct taxes; and this *must be claimed as an indirect tax*. If it were a direct tax, it would fall to the ground *instantly*, because of not being apportioned as direct taxes are required by the Constitution

to be.

Again, there is an exemption from all "*duties.*" This must unquestionably be regarded as a duty, if it is anything.

The Internal Revenue Act of June 30, 1864, six years anterior to the Refunding Act of July, 1870, (which is the first act containing the exemption in question,) shows *with absolute certainty* what, *at the time of creating this exemption*, the Government understood to be the proper term for describing a tax of this character, and that the word "*duty*" was such proper term. This Act of June 30, 1864, contains, in Section 124, an imposition of the burden of taxation upon legacies and distributive shares of personal property, in language very closely resembling that of the Act of 1898 imposing a tax of such character, and designates such tax as a "*duty*,"—the language being, that the persons upon whom the tax is imposed shall be, and hereby are, *made subject to a duty or tax* to be paid to the United States in the manner and to the extent thereafter following. In the final clause of that Section (124), is the declaration that property passing to husband or wife shall be exempt from tax or *duty*, and in the next section,

125, it is provided that the tax or *duty* aforesaid shall be a lien and charge, &c. And then in Section 127 are the provisions imposing a *succession tax upon real estate* passing by will or upon intestacy—a tax which it must be admitted is in its nature of very close kindred with the tax upon legacies and distributive shares—and various regulations in relation to such succession tax. Upon examining these provisions it will be found that this succession tax is described as a “*duty*,” pure and simple, without coupling that word with any other word. We quote from Section 133:

“And be it further enacted that there shall be levied and paid to the United States in respect of every such succession as aforesaid according to the value thereof the following *duties*, that is to say.”

There will also be found in that act a very great variety of internal revenue taxes, *e. g.*, upon auction sales, upon other sales, upon carriages, watches and silver plate, upon various manufactures, upon stamps, upon income, upon ale or beer, upon spirits, upon gross receipts of railroads, upon insurance and various other companies, and upon a great many other subjects, which we will not take time to particularize, in respect to which the term used is only “*duty*.”

13 Sts. at Large, Chapter 173, pp. 223 to 306.

It is thus *conclusively established that at, and for many years before, the time when this exemption was created* by the Refunding Act of 1870, taxes of this precise character upon, or in respect of, the passing of personal or real property, by will or upon intestacy, were, by the Government, *understood and reckoned to be, and treated, as “duties.”* How, in the face of this undeniable fact, the Government can now claim that an exemption from *all* “*duties*” does not include *this* duty, we confess our inability to understand.

We have the impression that the representatives of the Government have somewhere taken, or may take here, the position we have before mentioned, that we cannot claim exemption from this tax, because as they say, or may say, the exemption is only from taxes upon the bonds, and that this duty is not laid *upon the bonds*. It is nowhere provided that the exemption shall be merely from duties laid in form, or *eo nomine*, upon the bonds; it is *not at all* a provision that a *duty shall not be imposed upon the bonds*, but the provision is that the bonds shall be *exempt from the payment of duties*, and that exemption is not merely from duties laid directly or nominally upon the bonds, but unquestionably it is an exemption from the *payment of* all duties imposed upon, or *in respect of*, the bonds, directly or indirectly; the very idea of an *indirect* tax or duty is that, generally, it is not, or may not be imposed, upon the subject-matter taxed directly, *eo nomine*. The real substance and intent of this exemption provision, and so it should be construed, is, that this indebtedness of the Government, and the bond which evidences and represents it, shall be an *absolutely untaxable subject matter*, wholly free from the imposition upon, or in respect of, it, of any tax burden whatsoever, whether direct or indirect. Any construction which seeks to limit the effect of the exemption to a direct tax upon the bond itself, *eo nomine*, is not only a setting aside of the whole spirit and intent of the provision by a narrow and utterly inadmissible adherence to the supposed letter, but is likewise a *misreading even of the letter*.

It would hardly be denied, we suppose, that under this exemption of the United States bonds from all taxes or duties they are exempt from the ordinary annual tax laid by governments and municipalities upon personal estate, which, under the taxing systems of some of the States, including that of the State of New York, with which we are more particularly familiar, *does not describe or specify the particular items of property making up the*

amount for which the tax is imposed. A person is taxed, say, upon the amount of \$100,000, as the assumed amount of personal property possessed by him. The tax is *not* imposed upon the property specifically, and in general the taxing commissioners, or other body assessing it, do not at all know of what the property consists. The tax is imposed *upon the individual for and in respect of the property which he possesses or is supposed to possess*. Then, if he complains of the amount of the tax which is imposed—not upon any particular property, but *upon him personally as a property holder*—and there comes to be a development as to what his property consists of, and it turns out that \$50,000 of the \$100,000 is United States bonds, he is entitled, in virtue of this exemption, to have that amount counted out of the general amount of the tax imposed upon him personally. So would it be in New York, in case there were a direct tax, apportioned as required by the Constitution, imposed by the United States upon him in respect of the amount of his estate, or its income, if the practical assessment and collection of the tax were in accordance with the State laws, as might well be the case.

So in regard to a great number of other things which may occur in respect of United States bonds of this character while a person holds them. Let us refer to some of such supposed things, and put the question whether he could not, because of the exemption, resist any such indirect tax in respect of those things or those occurrences, though they were not burdens imposed upon the bonds themselves.

Suppose a United States bondholder to make a gift *inter vivos* of some of his United States bonds—or that, finding it convenient to raise money, he should see fit to pledge them for a loan (and it is well understood by all acquainted with the subject that United States bonds form, of all so called “collaterals” for loans, the very choicest kind of security, one which will always command the money from money lenders, if there be money on hand to be loaned at the

time—and so far as United States bonds are held by men of business, the chief temptation to them to hold them, is that they can always raise money upon them at very short notice)—then suppose the holder of United States bonds chooses to sell them, as he certainly has the right to do—then suppose, perceiving the near approach of death, he chooses to make, in respect of them, a *donatio causa mortis*, in the exercise of the clear right which he possesses under the common law, not based on any statute—then suppose, instead of leaving the disposition of his property, or some portion of it, to a testament, he chooses to make a trust deed of his United States bonds, to become operative on his death, reserving to himself the use and income for his life, as he has a clear right to do—and then suppose the Government to undertake to impose a tax upon him in respect of these transactions respectively, and to defy his claim for exemption from such taxes under the exemption clause now in question, upon the ground that they were *not taxes laid upon the bonds, eo nomine*, but upon specific occurrences relating to them, could the Government escape the effect of the exemption, in respect of such taxes, upon the ground, in the case first supposed, that it was taxing, *not the bond, but the gift*, and in the second case that it was taxing, *not the bond, but the pledge*, and in the third case that it was taxing, *not the bond, but the sale*, and in the fourth case that it was taxing, *not the bond, but the donatio causa mortis*, and in the fifth case that it was taxing, *not the bond, but the trust deed conveying it?*

All these taxes, supposing them to be undertaken by the Government, would be *indirect taxes*; perhaps they might impose them, or some of them, if they had not precluded themselves from doing so, but the difficulty would be that they have, by the contract, upon which they have borrowed the money, absolutely precluded themselves from ever imposing, upon or in respect of those bonds or the

indebtedness of the United States which they represent, any taxation, direct or indirect. Nay, more, if the Government can thus palter with the real spirit and intent of this act, why not go a step further and say, in the case of a general taxation of a man upon or in respect of his personal estate, for or in respect of his property including his United States bonds, when he claims the exemption so far as respects his United States bonds, that the tax is not laid upon the bonds, nor even upon him, but merely upon his *ownership*, and so that the contract exemption avails him nothing. We do not see that this would be much more absurd than the claim that the tax is on the transfer, the gift, the sale, or the trust deed in the cases supposed.

Now, if it should be asserted that the Government can rightfully deal with this subject-matter after this fashion, getting the money upon the faith of this pledge and frittering away upon mere verbalisms the whole substance and intent of the provision, might we not justly say, using in respect of such a performance the memorable words of Lord DENMAN, when delivering his judgment in the House of Lords, in the case of the tampering with the jury lists on the trial of O'CONNELL, that to permit such performances would be to render this exemption, to which the Government has plighted its faith, and on the strength of which it has succeeded in borrowing the money, "a mockery, a delusion and a snare."

We can hardly suppose that the representatives of the Government will undertake to maintain any such proposition, and we are quite sure that, should they do so, they will receive therein no countenance from this Court.

There was a principle established nearly a century ago by this Court, enunciated by Chief Justice MARSHALL in the case of *Brown v. State of Maryland*, 12 Wheat., at p. 444, and repeated by this Court in numerous decisions since that time, down to and including its decision upon the War Revenue Act here

in question, in *Nicol v. Ames*, 173 U. S., 509, 521—that a *tax upon a sale, a right to sell, or any other incident of a thing, is the full equivalent of a tax on the thing itself.*

We do not think it worth while to waste time in citing in detail the numerous authorities establishing this principle, with which the Court is unquestionably quite familiar.

We submit with entire confidence that this doctrine, so long ago established by Chief Justice MARSHALL and his associates, is absolutely conclusive against the entire contention of the Government in this case.

Fifth.

We come now to the question, whether there is any such special feature or quality in the nature of taxes on legacies, distributive shares, successions and inheritances as to enable the Government to lift them out of, and exclude them from, the effect of this general exemption from all taxes and duties upon United States bonds. As to that, it is to be observed in the first place that *at the time of granting this exemption the Government perfectly understood, and had long been imposing, taxes of this precise character, and had denominated them, in the act imposing such tax burdens, "duties."* Then they grant an exemption, by way of inducement to a lender of money, *from all duties.* If it was their intent to claim that *this particular duty* was not *one of the "all"* against which they granted the exemption, was it not incumbent upon them to call the attention of the persons, to whom they extended the invitation to lend them the money under this exemption, to this particular and extraordinary feature? It seems to us it was clearly so, and that they would be entirely estopped by their own action from now taking any such ground, supposing they could in any case take it, as we think they could not. In-

deed, we do not see at all how the Government could, suitably or properly, have altered the effect of the exemption so as not to embrace a tax of this character, short of an actual distinct change of the language of this exemption, *e. g.*, making it read—

“exempt from the payment of all taxes or duties of the United States, except taxes on legacies and distributive shares, successions and inheritances.”

We desire now to state another proposition which, perhaps, to some extent, may repeat something that has been incompletely said before, as to which our apology must be found in the very great haste with which this brief has necessarily been drawn, because of the very short time allowed for preparing and filing it. Our proposition is this: This exemption is clearly an operative exemption granted to and subsisting in favor of the original bondholder and of all who, as assigns or successors in interest, have succeeded to his original rights, and it is as fully applicable to the successor as it ever was to the original party. The exemption, as we have said before, embraces, as the party entitled to it, all persons who have lawfully succeeded to the ownership of, or a legal title to, or interest in, the bond, and the exemption is in favor of all on whom the burden of the tax or duty would fall if there were no exemption. The ascertaining whether a present holder or party in interest is entitled, as successor in interest, to the exemption, involves an inquiry into merely one question. Is he the *lawful assignee* of the original holder and the exemption which forms part of the bond? If he is, he is entitled to the exemption, *i. e.*, freed from any burden arising to him from or by reason of the tax or duty, exemption from which has been pledged by the Government. He is entitled to be in all respects in as good a position as if the supposed tax had no existence; as to him it has no existence, because the Government has abdicated, by its own will, its original power to impose it.

Now, is there any legal ground for distinction between the rights of the executor or administrator, in this respect taking by operation of law, and the right of any other assignee or assign of the original bondholder? We submit that there is not — that the simple question is, Is he the lawful successor in interest and holder of the right of the original bondholder? If he is, the exemption has been in legal effect transferred to him. If the bondholder had been alive, he would have held and represented the entire right to the benefit of the exemption, and he could not be compelled to pay any tax in respect of which there was an exemption. If he did have to pay it, of course, he would pay it from his own money.

The provision of the Act of 1898, under which this tax is claimed, provides that *the executor or administrator shall be subject to and shall be compelled to pay the tax*, but that as between him and the beneficiary he shall be entitled to credit for the payment so made. The substance of this is, that the trustee holding the legal title to the subject-matter pays the tax, and ultimately the beneficiary has to bear it. The executor or administrator and the beneficiary, together or in their united interests, represent the entire title to and interest in the bond and exemption, as fully as the original holder did, and the case merely is, that the executor or administrator and beneficiary, taken together, have the same exemption from being compelled to pay as the original bondholder had, neither more nor less. Nor is there any ground for distinction between the position of the executor or administrator and his beneficiary, representing and holding the original interest of the decedent, and the position of a transferee of the bond holding upon transfer of any description made *inter vivos*. It seems to us that clearly there is *not* any such difference in respect of indirect duties of such character as we have referred to, viz., duties in respect of gift, pledge, sale, *donatio*, *causa mortis*, transfer by

trust deed, and transfer in virtue of the laws of the State in consequence of the death of the decedent. It is true there is one distinction between the case of the transfer *inter vivos* and the other supposed occurrences which might have happened during the life of the original creditor, and the case of the transfer upon occasion of death; but it is not a difference operating in favor of the contention of the Government so as to entitle it to impose a tax in one case when it could not impose it in the other. In case of a transfer *inter vivos*, it is certainly a lawful transfer, and in case of the transfer in pursuance of law consequent upon death, it is an equally lawful transfer, but the difference which might be suggested is, that in life the bondholder may, if he so choose, avoid the making of the gift, the pledge, the sale, the *donatio causa mortis*, or trust deed, and it might be argued, we do not say reasonably so, that, if he did not like to be subjected to the tax for doing those things, he might avoid doing them, but there is no such option on the occurrence of death, absolutely inevitable and sure to come sooner or later, and there is no possibility of avoiding the devolution of the property according to law, if it remain the property of the bondholder at the moment of death.

There is another proposition which has been sometimes stated in reference to the nature and effect of the transfers of property which follow and are inevitably consequent upon the death of the owner. It is sometimes said that upon the death of a person owning property there is no absolute right of any one to the property which he possesses at his death, and that if any one gets any of it as next of kin, legatee or otherwise, he gets it by grace and the favor of the State in permitting him to receive it. It is said in substance, if we understand the proposition, that at the death of a person all the property that he owned, of whatever kind, belongs *potentially* to the State, and that therefore, taxation may be imposed upon property of that description

ad libitum, and, if anyone gets anything out of such property, he should be thankful for the favor, and has no right to ask any questions as to anything taken out of it by anyone else. We cannot think that that is sound law altogether, but, if it is, we submit, that it does not help this contention on the part of the Government one iota. If it be true that at death the State Government has the right to take the whole property of the decedent and either keep it itself or do what it chooses with it, that does not give any other government any right to lay a finger upon it. The United States, in case of the death of a citizen, cannot lay its hand upon a sixpence of the decedent's property *otherwise than by the lawful* exercise of its taxing power, and, so far as respects the United States bonds in question, it has abdicated that power.

As this Court said, in distinguishing *Scholey vs. Rew*, 23 Wall., 331—

“It was like the succession tax of a State held constitutional in *Mager vs. Grima*, 8 How., 490, and *the distinction between the power of a State and the power of the United States* to regulate the succession of property was not referred to, and does not appear to have been in the mind of the Court.”

Pollock vs. Farmers' Loan and Trust Company, 157 U. S., at p. 578.

We do not propose in this brief to discuss questions arising or which may arise in relation to this asserted power of the State government to treat itself, as it were, as forced heir of any of its citizens who dies, and to take to itself all his property and deal with it as its own as it chooses. We believe there is no decision in this Court which establishes that supposed proposition. There have been, we believe, perhaps some few decisions and a good many *dicta* of various Judges upon that subject, and discussion in relation to it may be very pertinent in a case which will soon come before this Court in reference to the power of the *State* to tax the exempted

United States bonds by a legacy or succession tax. We certainly are not prepared to accept this doctrine to the full extent that is sometimes claimed. The discussion of it would be quite long and perhaps highly interesting; but, as it is not material to the decision of this case, we do not propose to enter upon it. Some of the *dicta*, at least, strike us as rather strange, but we venture to say no more than this, which we think we may say without being chargeable with the crime of speaking evil of dignities, that sometimes some Judges in some States of this Union have said things which were not wise.

Now, we have to inquire what is or what would be the effect upon the question in this case, *viz.*, the liability of the United States bonds to Federal taxation, of the assumed right of the State as sovereign to take to itself all the property of the deceased in disregard of his will and of any supposed rights of his next of kin. It seems to us that that question can have no application or effect in testing the right of the United States to tax these bonds, because, admitting that the State might have taken to itself by a species of confiscation, as it were, the whole property of the decedent, including United States bonds, it certainly has not done so, and it may be safe to say that it never will do so, unless we are to return to a state of barbarism. It seems to us that this *practical question* is not to be dealt with upon the supposition of this imaginary and practically impossible basis, of the State grabbing the entire property of a citizen as its own the moment the breath leaves the body. The question is, what is the property right of the personal representative of the decedent, who has taken his title, as such, to the United States bonds in question, by due operation of law, under a system which has existed almost from time immemorial, certainly for many hundreds of years. But we say further, and we think with entire soundness as a legal proposition, that if there can be lugged into this case, for the purpose of enabling the United States to escape from this

contract exemption, this extraordinary supposed right of the State as a sovereign to take the entire property upon the death of the decedent, the possibility of such dealing with the property of the decedent can give the Government no greater right than would the actual occurrence of this extraordinary performance by the State, supposing it should be entered upon by it.

Now, let us inquire what would be the status of the Government in respect of the exempted United States bonds held by the decedent at the time of his death, 'supposing the State should exercise this assumed right of taking to itself as owner the whole property of the decedent. If it lawfully could, and actually should do that, the whole subject-matter, including the United States bonds, would become the property of the State *instantly* upon the occurrence of death, and supposing the United States to be precluded, as certainly it was, by the exemption, from any taxation of these bonds up to the moment of the death of the decedent, then *at the moment* of the State's acquisition of the property, and from thenceforth so long as the State continued to hold it, the United States would be unable to tax it, not merely because of the exemption, but because of the inherent lack of power of the United States to tax the property of the State. That proposition is indisputable, and has always been recognized; and, the United States having no power to tax the bonds while the property of the State, it would be equally precluded, by the inherent lack of power which we have referred to, from taxing any transfer by sale, gift or otherwise which the State might choose to make of the property. If the property belongs to the State, it can give it away to whomsoever it pleases; as to that, it has absolute and complete *jus disponendi*, and the United States cannot tax that action of the State in any form whatever. Take the case of a State lawfully and fairly becoming entitled by escheat to the real estate of a citizen dying without heirs; of course, that

property could not be taxed by the Government of the United States while the State held it. Then, supposing the State should see fit to turn around and give the property to the widow, the United States could not tax that gift to the widow, whether the gift were made by an act of the Legislature or in any other form whatsoever.

Indeed, any transfer or disposition *which the State may choose to make* of any property which it may have acquired, either actually or potentially, from a decedent under the alleged sovereign right which has been referred to, by any method it may choose to adopt for such purpose, is in no wise taxable by the United States.

Suppose the State should choose to give property belonging to it, either by act of the Legislature or by any other method, to a college, library, church, hospital, or any other subject upon which it might choose to confer a benefaction, could any such gift be taxed by the United States? Suppose the State chooses to supplement the pension and bounty afforded by the United States to its soldiers by a State pension or bounty, as has sometimes been done,—can it be supposed that that State pension or bounty could be taxed by the United States? Suppose that, instead of doing any such thing as above suggested, the State should choose to sell the property, at auction or otherwise, and put the money in its Treasury and expend it for general purposes, could the auction or other sale, or anything in connection with it, be taxed by the United States Government? It would be idle to pursue these illustrations further, because it is too plain for dispute that any act of the State disposing of the property which belongs to it, either by sale or gift, or any other method, is no more taxable by the United States than is the property of the State while it continues to hold it.

Now, we do not need to say, and it is no part of our contention, if the State has thus sold or given away property which it acquired, either lawfully and properly by escheat, or by becoming as the

sovereign the necessary distributee or successor of a person dying intestate and without next of kin, or which it may have acquired by the supposed "grab" of the whole property of a decedent, under the doctrine above referred to, the supposition of which is invoked against us for destroying our contract right of exemption, that, after the property thus taken by the State has become again individual property as part of the property of the donee or purchaser, it may not be subject like other property in the hands of individuals to the legitimate exercise of the taxing power by the State or United States, exactly as if this extraordinary event in the devolution of the right to it had not occurred, but the difficulty *then* in the way of defeating us of our just rights under the exemption would be that at the moment when the exemption of the State under its inherent immunity would have ceased, the contract exemption would have become operative and effectual, for the benefit of the donee or purchaser, who would then have become the lawful owner of the bonds and in legal effect the "assign" of the original holder.

We desire to make some observations in relation to certain propositions by way of argument contained in the additional brief of the Solicitor General, dated December 13, 1899, that being the only brief on that side which we have been able to examine, and we have to do this very briefly, under great pressure of time.

This brief seems to assume that the practical operation of the claims made by the parties to the record adverse to the Government, in respect of the inherent lack of power of the United States to tax franchises or privileges granted by the State, or things done by the grantees of such privileges or franchises in execution of the powers conferred upon them, would, if practically applied, cut up or destroy in great measure the Internal Revenue Taxes of the United States. What may have been claimed on this subject by the parties to the record adverse to the Government we do not at all know, nor do we pre-

cisely understand at this moment what the Solicitor General claims in this respect. What we have to say on this subject, we are obliged to say in very few words, and the general meaning and intent of what we have to say, and the distinction we draw, may, we think, be fairly understood from a single illustration. If a State grants a charter to a bank, which is a franchise, and the bank engages in operations that might as well have been done by an individual, supposing there were no law restraining individuals from such action, say receiving deposits, making discounts, &c., we might not be disposed to deny that the Federal Government would have a like right to tax such *transactions* carried on by the corporate body as it would have to tax them if carried on by an individual. But we submit that it is quite clear that, supposing the United States could thus tax the transactions, *it could not tax the charter granted* by the State. It is the *grant, gift, privilege, right, or power* conferred by the State which is absolutely exempted. That is our contention. We think this sufficiently indicates the distinction which we make. We do not intend, in anything we say on this subject, to interfere in the slightest degree with any contention on the subject which may have been made or may be made by the parties to the record.

Inasmuch as the only brief on behalf of the defendants in error which we have seen, viz., this additional brief of December 13, 1899, does not discuss nor even allude to the contract exemption which is the basis of our contention, we are left to conjecture as to what answer the Solicitor General may make to our propositions asserted in this brief.

We are inclined to think, from some things we have heard, that he may present a line of argument, that this is a tax upon some privilege alleged to have been derived from the State, either of disposing of the property by will, or of receiving the benefit of such a disposition, or perhaps of both such supposed privileges. Inasmuch as we shall have no opportunity to reply to any answer the Solicitor General

may give to our arguments, we think it best to make here, as briefly as may be, such reply by way of anticipation.

We think that any such contention on behalf of the Government must necessarily be ineffectual and wide of the mark, because of its not being directed to the real point upon which the case turns.

Our contention is *not* a dispute of the right of the United States to impose a tax, *in general*, upon the transfer or passing of the personal property of a deceased person, upon and in consequence of his death, under and in pursuance of the laws of the State of his residence, to his executors or administrators in the first instance, and subsequently, in due course of administration, after payment of debts and expenses by the executor or administrator, to legatees or next of kin as distributees according to their rights under his will, or upon his intestacy.

We do not feel called upon to affirm or admit the existence of a right in the United States to impose such a tax, upon or in respect of the passing or transmission of the *property in general* of the decedent. It is not requisite for our purpose in this case to deny the existence of such a right.

All points of inquiry in relation to the nature, extent and effect of such a tax when imposed, and as to whence, or how, the power of the United States to impose it has been derived, and as to the cause or reason for imposing the tax, *e. g.*, as for some supposed privilege to transmit from the dead to the living, and as to whether, ordinarily, it should be ranked as a direct or indirect tax, however important such inquiries may be or may have been in other cases, are of no practical importance here. The point, whether it is a direct or indirect tax, is here settled by the agreement on all hands that it is an indirect tax.

Conceding the original right to impose such a tax, there can be no possible doubt of the right of the Government to renounce such right in particular cases, or in respect to particular property, and the question is, whether they have so renounced in re-

spect to this particular property—these bonds. It is indisputable that if, by lawful contract, these particular bonds have been *established by the Government as an absolutely untaxable subject-matter* all such inquiries as we have alluded to, and all inquiries of like nature, have become utterly immaterial. We think that we have, in other places in this brief, said enough to show, beyond peradventure, that, when considered with reference to either its language, or its intent, or both, the exemption of these bonds is effectual to exempt them as well from this particular tax as from all others.

The exemption in the bonds is a contract, extending through a period of years until maturity, in favor of the *holder*, or "*assigns*," for the time being. It is an exemption from the "*payment*" of all indirect taxes or "*duties*," as well as from direct taxes, *operating in favor of the executor or administrator, as such holder, or of the legatee or distributee entitled to the beneficial interest therein, as fully as in the case of any other holder or "assign."* Just as it is the holder who must *pay* the tax, if there be no exemption, so it is the holder in whose favor such an exemption must operate. The executor or administrator is directed to pay this tax on "*personal property*" in general, by the mandate of the statute. But, by the equally potent mandate of the statutes authorizing these bonds, he is *exempted from the "payment" of "all" such taxes on this particular species of "personal property"—the United States bonds in question.*

For whatsoever cause, whether through the exercise of some right or privilege, or otherwise, this tax is imposed, the person who, if there were no exemption, would be obliged to make "payment" of the tax, is, by this express contract, exempted from such "payment"

In conclusion, we have this to say upon the general merits of this controversy and in reference to the

spirit and general principles upon which we think this question ought to be determined.

It is not a question of law, in the ordinary sense, but is a question as to the true construction and effect of the language of a contract entered into between the Government and individuals, the language having been devised by the Government, and proffered to and accepted by the individuals as the basis upon which loans of money were made to the amount of upwards of a thousand millions. This contract upon its face appears to be very plain, simple and conclusive. It was offered for the action of a vast body of laymen. It has been accepted and acted upon accordingly. It seems to us that the grounds upon which it is sought to be construed, so as to elude the exemption, are extremely artificial, based upon supposed technicalities, and that it may not be inappropriate for us to say that they are rather verbal subtleties than anything else. The substance of the matter is, that the Government for its own necessity, and as part of a scheme of saving money to a great extent in refunding its debt, which scheme has been successful to its very great profit—legitimate enough—originated the idea of this exemption, by way of inducement to the taking of its loan at a greatly reduced rate of interest, framed the form of the exemption and communicated it to the bondholders in the most effective manner, so that it was accepted and acted upon, and the money borrowed upon the faith of it and upon the understanding of its import and effect, which was naturally deduced from the language which the Government employed in framing it; and we think there can be no doubt that that language was understood, and rightfully understood, by the persons who accepted and acted upon it, as containing a complete exemption from taxation of any and every kind by the United States, upon or in respect of the bonds or the debt which they represented, and in full faith and confidence that, by the investment which they thus made at a

rate of interest theretofore unprecedented in United States loans, they had secured for the benefit of themselves during their lifetime, and for their families who were to come after them, a complete and thorough exemption from subjection to taxation in any form or to any extent whatsoever by the United States. The language is that they shall be exempted from the payment of all duties and taxes whatsoever. In our view, this case involves, on the part of the Government, so far as these bonds are concerned, an attempt radically to change the words, "exemption from," to the rather opposite words, "subjected to." The words "subject to" are the precise ones used in this taxing act, and it seems to us that no such violent change of language should be permitted to one party to such a transaction to the prejudice of the other, except upon the highest and most absolute necessity, and consistently with entire good faith and fair dealing on the part of the Government. We think that there is no substantial basis upon which, consistently with good faith and justice, any part of the principal of these bonds can be taxed away from them, or from the original bondholders, or from their families coming after them.

In respect of this highly artificial basis, which we believe is the main reliance of our adversaries—that this property is held by the representatives of the decedent, the personal representatives, who hold the legal title, and the beneficiaries for whom the personal representatives hold it, in the exercise of some peculiar privilege or franchise, which they say can be taxed, we have this further to say:

Whatever may be the language and effect of this so-called right or privilege of having one's property go at one's death to his next of kin or to his appointees by will, it is no new right or privilege created after the passage of this act. It makes no difference, in our view, whether such right was created by common law or by statute. Howsoever it was created, it has been in existence for many hun-

dreds of years, and it is safe to say that so long as civilization remains it will never be taken away. If we are not mistaken, the power of disposing of personal property by testament existed in some form in England, even in the days when England was under Saxon rule, we think in the reign of King Alfred.

If this right can legitimately be called a franchise or privilege, it is *not* so in virtue of any *special* grant, privilege, or franchise, but it is a right *existing by the law of the land in any and every person*. To speak of this *right*, even in a general sense, as a taxable privilege, would be, to our minds, absurd. But we do not dispute the right to tax *transactions or dealings* by persons, in the exercise of such a right of this general nature, *if the transaction or dealing is, in its own nature, properly taxable*. *Here, the exemption contract makes this particular transaction non-taxable, in the case of these bonds.*

Without entering into further particulars or making further argumentative remarks, we think we may fairly rest upon the general principle, that this contract having been devised by the one party and accepted by the other under the circumstances which appear, it should not be permitted, and we feel that it will not be permitted, by this Court, to be eluded by hypercriticism or by any verbal refinements, wholly inconsistent with justice, and wholly disappointing to the rightful understanding and just expectation, in respect of the effect of this contract, under which the original lenders were induced to part with the thousand millions, or thereabouts, by way of loans to the Government.

EVARTS, CHOATE & BEAMAN,
Attorneys for CHARLES F. SOUTH-
MAYD and others, holders of United
States Bonds.

CHS. F. SOUTHMAYD,
In Person,
WILLIAM V. ROWE,
Of Counsel.

APPENDIX.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., January 3, 1900.

MESSRS. EVARTS, CHOATE AND BEAMAN,
New York, N. Y.

GENTLEMEN:

In response to your telegraphic request of this date, I enclose herewith a copy of the latest debt statement giving the total amount of bonds outstanding and the amounts issued under each act. I also enclose copy of a document addressed to the Senate of the United States in response to a resolution, said document giving a copy of each obligation of the United States issued since 1792, with the exception of the three per cent. loan of 1898. The text of the three per cent. bonds as to the clause exempting them from taxation is as follows: "The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority." *Each bond of the United States now outstanding, whether registered or coupon, contains the exemption clause above quoted or stated in the document herewith enclosed.*

Respectfully yours,

L. J. GAGE,
Secretary.

STATEMENT OF THE PUBLIC DEBT

AND OF THE

CASH IN THE TREASURY OF THE UNITED STATES

FOR THE MONTH OF DECEMBER, 1899.

INTEREST-BEARING DEBT.

Title of Loan.	Authorizing Act.	Rate.	When Redeemable.	Amount Issued.	OUTSTANDING DECEMBER 31, 1899.		
					Registered.	Coupon.	Total.
Loan of July 12, 1882.....	July 12, 1882.....	3 per cent.....	Option U. S.	\$895,823,000 00	.....	.....	.....
Funded Loan of 1891.....	July 14, '70, and Jan. 20, '71.....	4½ per cent..... Cont'd at 2%.....	September 1, 1891... Option U. S.	250,000,000 00	{ \$25,364,500 00	.....	\$25,364,500
Funded Loan of 1907.....	July 14, '70, and Jan. 20, '71.....	4 per cent.....	July 1, 1907.....	740,914,050 00	478,219,100 00	\$67,147,450 00	545,366,550
Refunding Certificates...	February 26, 1879	4 per cent.....	.....	40,012,750 00	.....	.....	37,12
Loan of 1904	January 14, 1875.....	5 per cent.....	February 1, 1904.....	100,000,000 00	64,307,350 00	30,702,350 00	95,009,70
Loan of 1925.....	do	4 per cent.....	February 1, 1925	162,315,400 00	117,690,150 00	44,625,250 00	162,315,40
Ten-Twenties of 1898.....	June 13, 1898.....	3 per cent.....	After Aug. 1, 1908.....	198,679,000 00	109,426,680 00	89,252,320 00	198,679,00
	Aggregate of Interest	Bearing Debt.....	.....	\$1,797,450,800 00	\$795,007,780 00	\$231,727,370 00	\$1,026,772,35

[Of the following document, referred to in the Secretary's letter, we print only the material portions, including only forms of the bonds issued under the Refunding Act and subsequent acts, and now outstanding.]

54th Congress, } 1st Session. }	SENATE.	{ Document No. 154.
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IN THE SENATE OF THE UNITED STATES.

March 9, 1896.—Referred to the Committee on Finance and ordered to be printed.

The Vice-President presented the following:

LETTER FROM THE SECRETARY OF THE TREASURY, TRANSMITTING, IN RESPONSE TO RESOLUTION OF THE SENATE, DATED DECEMBER 31, 1895, THAT THE SECRETARY OF THE TREASURY BE DIRECTED TO REPORT TO THE SENATE A STATEMENT CONTAINING A COPY OF EACH OBLIGATION OF THE GOVERNMENT SINCE MARCH 4, 1789, ETC., PAPERS CALLED FOR BY SAID RESOLUTION.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., March 5, 1896.

SIR.—I have the honor to transmit herewith, in response to Senate resolution dated December 31, 1895, receipt of which was acknowledged January 8, 1896, the papers called for by said resolution, which was as follows:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing

such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver, and gold.

I also inclose copy of a letter on the subject from the Register of the Treasury, dated February 25, 1896.

* * * * *

Respectfully yours,

J. G. CARLISLE, *Secretary.*

The PRESIDENT OF THE SENATE.

TREASURY DEPARTMENT,
OFFICE OF THE REGISTER,
Washington, D. C., February 25, 1896.

SIR: On January 13 I received from you a resolution passed by the United States Senate on December 31, 1895, as follows:

Resolved, That the Secretary of the Treasury be, and he is hereby, directed to report to the Senate a statement containing a copy of each obligation issued by the Government since March 4, 1789, with a reference by title and date to the laws respectively authorizing such issues, and showing the amount of each issue and the amount now outstanding, properly classified, and including Treasury notes of every kind, bonds and certificates for currency, silver and gold.

In reply to the foregoing resolution, which is herewith returned, I have the honor to transmit the accompanying report. It contains a table showing the amount of all obligations of the Government since March 4, 1789, classified by loans, and with appropriate references to the volumes and pages of the authorizing acts as given in the Revised Statutes. The table also shows the amount which on January 1, 1896, appeared to be outstanding under each class

of security, as shown by the books of the Department.

Probably some of the issues are not those contemplated by the resolution, but it was deemed wiser to make the table include all the loans of the Government than to attempt to construe the meaning of the resolution. The tables include the three loans of the District of Columbia issued under authority of acts of Congress. In several cases it should be understood that the amounts given as issues include a large amount which may be classed as reissues.

I have also given, as fully as could be done, *copies of each kind of obligations which have been issued by the Government*. This series is believed to be complete for all issues subsequent to 1822, and it includes several of the most important issues of an earlier date. Coupon bonds were not used in connection with the earlier issues of the Government, but in issues which include both coupon and registered bonds it has been considered to meet the purpose of the resolution to give a copy of either, but not of both. It has not been considered necessary to give a copy of more than one denomination. On the earlier loans (with some exceptions) it was not customary to print the denominations, and the amount for which a bond was issued was written in with a pen.

Since 1847 it has been customary to print on the back of registered bonds a blank form for convenience in making assignments. As these are almost identical in phraseology, and constitute no part of the obligation of the Government, it has been considered unnecessary to repeat the form with each bond. An example of this form may be found with the 4 per cent. consol bond of 1907.

* * * * *

Respectfully yours,

J. F. TILLMAN,

Register.

HON. JOHN G. CARLISLE,

Secretary of the Treasury.

* * * * *

OBLIGATIONS ISSUED BY THE UNITED
STATES GOVERNMENT SINCE MARCH
4, 1789.

* * * * *

Five per cent. funded loan of 1881.

Series of 1878.

WASHINGTON, May 1st, 1871.

Funded Loan of 1881 (Interest five per cent.)

Principal and Interest
payable in
1000
Coin at the Treasury of the
United States. (Seal)

THE UNITED STATES OF AMERICA.

Are indebted to....., *or assigns*, in the sum of one thousand dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An Act to authorize the re-funding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of May, A. D. 1881, in coin of the standard value of the United States, on said July 14, 1870, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly, on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue.....

Entered.. ..

Recorded

Register of the Treasury.

Act of July 14th, 1870.

Five per cent. loan of 1881, continued at 3½ per cent.

Series of 1878.

WASHINGTON, May 1st, 1871.

Funded loan of 1881 (Interest 5 per cent.)

Principal and Interest
payable in coin at the
10,000
Treasury of the
United States.

THE UNITED STATES OF AMERICA

Are indebted to *or assigns*, in the sum of Ten Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An Act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of May, A. D. 1881, in coin of the standard value of the United States, on said July 14, 1870, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly, on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority. Transferable on the books of this office.*

{ Seal of
U. S. Treas.
Dept. }

Date of issue

Entered

Recorded

Register of the Treasury.

Ten Thousand Dollars. Act of July 14, 1870. Ten
Thousand Dollars.

(Memorandum printed across the face of the bond.)
At the request of and for value received by the owner of this bond, the same is continued during the pleasure of the Government, to bear interest at

the rate of three and one-half ($3\frac{1}{2}$) per centum per annum from August 12, 1881, as provided in Treasury circular No. 52, dated May 12, 1881.

Four and one-half per cent loan of 1891.

WASHINGTON,

Sept. 1st, 1876.

FUNDED LOAN OF 1891.

Principal and interest
payable in coin at the
Treasury of the
United States.

Interest
4 $\frac{1}{2}$
per cent.

THE UNITED STATES OF AMERICA

Are indebted to-----or assigns, in the sum of Ten thousand Dollars. This bond is issued in accordance with the provisions of an Act of Congress, entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of September, A. D. 1891, in coin of the standard value of the United States, on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four and a half per centum per annum, payable quarterly, on the first day of December, March, June and September in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue.....

Entered.....

Recorded

Register of the Treasury.

Act of July 14, 1870.

*Four and one-half per cent. loan of 1891, funded,
continued at 2 per cent.*

WASHINGTON, Sept. 1, 1876.

FUNDED LOAN OF 1891.

M.

Interest $4\frac{1}{2}$ per cent.

Principal and Interest
payable in coin
1000
at the Treasury of the
United States. A.

THE UNITED STATES OF AMERICA.

Are indebted to....., *or assigns*, in the sum of one thousand dollars. This bond is issued in accordance with the provisions of an Act of Congress entitled, "An Act to authorize the refunding of the National Debt, approved July 14, 1870, amended by an act approved January 20, 1871," and is redeemable at the pleasure of the United States after the first day of September, A. D. 1891, in coin of the standard value of the United States, on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four and a half per centum per annum, payable quarterly, on the first day of December, March, June and September in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of issue.....

Entered.....

Recorded.....

Register of the Treasury.

Act of July 14th, 1870.

(Memorandum printed across the face of the bond.) At the request of and for value received by the owner of this bond, the same is continued during the pleasure of the Government, to bear interest at the rate of two (2) per centum per annum from September 2, 1891, as provided in Treasury circular No. 99, dated July 2, 1891.

Four per cent loan of 1907, consols.

(Face of bond.)

1877

1907. M

FOUR PER CENT CONSOLS OF THE UNITED STATES.

A 4

Washington, July 1st, 1877.

Principal and interest payable in coin
One M Thousand
at the Treasury of
the United States.

THE UNITED STATES OF AMERICA

Are indebted to.....or assigns, in the sum of One Thousand Dollars. This bond is issued in accordance with the provisions of an act of Congress entitled "An act to authorize the refunding of the National Debt, approved July 14, 1870." amended by an act approved January 20, 1871, and is redeemable at the pleasure of the United States after the first day of July, A. D. 1907, in coin of the standard value of the United States on said July 14, 1870, with interest, in such coin, from the day of the date hereof, at the rate of four per centum per annum, payable quarterly, on the first day of October, January, April, and July in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this Office.*

Date of issue.....

Entered

Recorded

Register of the Treasury.

Act of July 14th, 1870.

(Back of Bond.)

Act of July 14th, 1870. Amended January 20th, 1871.

TRANSFER (NO.).

Original Date....

Original No.

1000. FOUR PER CENT. CONSOLS. 1877-1907.

For value received, assign to
 the within registered bond of the United States, and
 hereby authorize the transfer thereof on the books
 of the Treasury Department.

Dated, 18..

State of, County of, Town
 of.....

Personally appeared before me the above named
assignor, known or proved to me to be the
 payee of the within bond, and signed the above
 transfer, acknowledging the same to be his free act
 or deed.

Witness my hand, official designation, and seal.

NOTE.—The execution and acknowledgment of
the above assignment, when not made at the Treas-
 ury Department, must be before a U. S. Judge, U.
 S. district attorney, clerk of a U. S. court, collector
 of customs, collector or assessor of internal revenue,
 U. S. Treasurer or Assistant Treasurer, or the pres-
 ident or cashier of a national bank, or, if in a foreign
 country, before a U. S. minister or consul. In all
 cases the officer must add his official designation,
 residence and seal if he has one. When the *assign-*
ment is made by a corporation, it must be named as
 the assignor; *when by a guardian, trustee, execu-*
tor, administrator, an officer of a corporation, *or*
anyone in a representative capacity, proof of his
 authority to act must be produced to the officer be-
 fore whom *the assignment* is made and must ac-
 company the bond. *Assignors* must be identified as
 known and responsible persons to the satisfaction of
 the officer.

One Thousand.

Five per cent Loan of 1904.

One M thousand, 1894. 1904 M.

FIVE PER CENTS OF 1894.

1,000 5 5 1,000

Washington, D. C. February 1, 1894.

M. THE UNITED STATES OF AMERICA

Are indebted to.....or assigns, in the sum of One thousand Dollars. This bond is issued under authority of an act of Congress, entitled "An act to provide for the resumption of specie payments," approved January fourteenth, eighteen hundred and seventy-five, being one of the descriptions of bonds described in the act entitled "An act to authorize the refunding of the national debt," approved July fourteenth, eighteen hundred and seventy, as amended by the act of January twentieth, eighteen hundred and seventy-one, and is redeemable at the pleasure of the United States after the first day of February, nineteen hundred and four, in coin of the standard value of the United States on said July fourteenth, eighteen hundred and seventy, with interest in such coin from the day of the date hereof at the rate of five per centum per annum, payable quarterly on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this office.*

Date of record

Entered

Recorded

.....
Register of the Treasury.

Act of January 14, 1875.

Four per cent. loan of 1925.

Act of January 14, 1875.

WASHINGTON, D. C., February 1, 1895. 1,000

1925. FOUR PER CENTS OF 1895.

1,000. THE UNITED STATES OF AMERICA. No.

Are indebted to.....or assigns, in the sum of One thousand Dollars. This bond is issued under authority of an act of Congress entitled "An act to provide for the resumption of specie payments," approved January fourteenth, eighteen hundred and seventy-five, being one of the descriptions of bonds described in the act entitled "An act to authorize the refunding of the national debt," approved July fourteenth, eighteen hundred and seventy, as amended by the act of January twentieth, eighteen hundred and seventy-one, and is redeemable at the pleasure of the United States after the first day of Feb., nineteen hundred and twenty-five, in coin of the standard value of the United States on said July fourteenth, eighteen hundred and seventy, with interest in such coin from the day of the date hereof at the rate of four per centum per annum, payable quarterly on the first day of February, May, August and November in each year. *The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal or local authority. Transferable on the books of this Office.*

Date of issue

Entered

Recorded

Register of the Treasury.

Form of Bond under Act of 1898.

1898 THREE PER CENT. LOAN OF 1898 1918

THE UNITED STATES OF AMERICA

are indebted unto the *bearer* in the sum of
dollars.

This bond is issued under authority of an Act of Congress entitled "An Act to Provide Ways and Means to Meet War Expenditures," approved June thirteenth eighteen hundred and ninety-eight and is redeemable at the pleasure of the United States after the first day of August, nineteen hundred and eight, and payable August 1, 1918, in coin, with interest at the rate of three per centum per annum, payable quarterly in coin on the first day of November, February, May and August in each year. *The principal and interest are exempt from all taxes or duties of the United States as well as from taxation in any form by or under State, municipal or local authority.*

WASHINGTON, D. C., August 1, 1898.

Entered
Recorded

Act of June 13, 1898.

J. W. LYONS,
Register of the Treasury.

for 458 and 459.

CHIEF JUSTICE COURT U.
FEB 26 1900
JAMES H. SHERMAN, JR.

Drp. (reply) of Southmayd & Rowe
Supreme Court of the United States.
for Bondholders (l)

OCTOBER TERM, 1899.
No. 458.

Filed Feb. 26, 1900.

GEORGE T. MURDOCK, AS EXECUTOR, &C., OF JANE H. SHERMAN,
DECEASED,

Plaintiff in Error,

vs.

JOHN G. WARD, AS UNITED STATES COLLECTOR OF INTERNAL REVENUE,
Defendant in Error.

No. 459.

GEORGE D. SHERMAN,

Plaintiff in Error,

vs.

THE UNITED STATES,

Defendant in Error.

BRIEF IN REPLY ON BEHALF OF UNITED STATES BONDHOLDERS,
FILED BY LEAVE OF COURT IN ANSWER TO TECHNICAL OBJECTION
TO THE SUFFICIENCY OF THE RECORD, RAISED FOR THE FIRST
TIME BY THE SOLICITOR-GENERAL IN HIS REPLY TO THE BRIEF
OF EVARTS, CHOATE & BEAMAN.

EVARTS, CHOATE & BEAMAN,

*Attorneys for CHARLES F. SOUTHMAYD and
other Holders of Bonds.*

CHS. F. SOUTHMAYD,

In Person.

WILLIAM V. ROWE,

Of Counsel



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as Executor, &c.,
of Jane H. Sherman, deceased,
Plaintiff-in-Error,

vs.

JOHN G. WARD, as United States Col-
lector of Internal Revenue,
Defendant-in-Error.

No. 458.

GEORGE D. SHERMAN,
Plaintiff-in-Error,

vs.

THE UNITED STATES,
Defendant-in-Error.

No. 459.

BRIEF IN REPLY

*On behalf of United States bondholders, filed by
leave of Court in answer to technical objec-
tion to the sufficiency of the record, raised for
the first time by the Solicitor-General in his
reply to the brief of Evarts, Choate & Beaman.*

In his brief in reply to that of Evarts, Choate & Beaman, the Solicitor-General *for the first time, at this final stage* of the cause, raises a technical objection to the sufficiency of the records in Nos. 458 and

459, to present the question, so elaborately argued, as to the validity of the Federal Succession Tax when imposed in respect to the "passing" of United States bonds.

Throughout all the argument heretofore it has been assumed that there was no possible objection to these records, and it is somewhat suggestive that we should find an objection of this technical nature raised at the final stage of the argument.

The learned Solicitor-General says (page 5 of brief in reply to Evarts, Choate & Beaman):

"Pages of elaborate discussion are submitted by counsel upon the question whether the United States bonds which pass either by will or by intestate laws from a testator or intestate to his legatee or distributee are subject to this tax or duty, and yet no case presenting an instance of such passage or transmission is before the Court. Cases Nos. 458 and 459 present the same facts * * * in neither case is it averred that any specific tax was made of any United States bonds owned by the testatrix at the time of her death. The only averment with respect to such bonds is that about one-third of the estate was invested in them at the time of her death."

And again he says:

"The only averment is that the testatrix died possessed of an estate of which one-third consisted of United States bonds. There is no allegation that these bonds have passed by the will to the legatees or any of them. For aught that appears in the record the executor and trustee may have sold every bond, may have distributed a portion of the proceeds in money among the legatees and have invested the balance under the residuary clause in taxable securities."

Brief in Reply, &c., pp. 5 and 6.

The learned Solicitor-General is not only mistaken in his facts, but (on p. 5, near the foot of the

page) he make the fatal admission that these are cases—

“where a *personal estate* of a certain value in money has passed to the executors to be charged against them as money,” &c.

The War Revenue Act of June 13, 1898, distinctly imposes this tax upon those very persons to whom the Solicitor-General declares that this estate has passed, and to whom, as we shall show, it has in fact passed, that is to say, upon the executors and trustees.

Section 29 of the act provides that

“Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property * * * passing after the passage of this act from any person possessed of such property * * * shall be and hereby are made subject to a duty or tax to be paid to the United States.”

In other words, it is *the executors and trustees* in this case, who have in charge the property and who are “made subject to a duty or tax to be paid to the United States.” They and they alone are the persons taxed in respect to property “passing to them.” The property passed to them at death, and the tax then attached and was paid by them. The schedule or return, made by the Collector and annexed to the petitions and complaint in each case, shows that it was *the whole estate* “passing” to the executors, referred to in the petition and complaint, upon which the tax was laid.

The learned Solicitor-General is mistaken in his assertion that the facts in the two cases are identical.

In the *Murdock Case*, No. 458 (record, pp. 6 and 7), it appeared that, under the will of Jane H. Sherman, deceased, there passed to the plaintiff as executor and trustee under her will a very large

personal estate, upon the passing of which to the plaintiff the Collector of Internal Revenue had exacted a tax of \$36,827.53, this tax being levied (p. 7) on account of the legacies or distributive shares "arising from personal property" being "*in charge or trust*" of this plaintiff as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman (see also return and schedule to Collector annexed to complaint). It then appears on page 8 that—

"A very large proportion, and at least *one-third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff, consisted in the bonds and interest-bearing evidences of debt issued by the Government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding as executor as aforesaid or otherwise of such bonds and certificates of indebtedness.*"

It would be difficult to conceive of a case more explicitly presenting the precise questions argued than does this record in No. 458. The law provides that the tax shall be levied upon the *executor*, in respect to the estate "*passing*" from the testator, and which at the time of the levying of the tax is found *in the possession of the executor*. It is the "*passing*" of the property which is taxed, and it is the *executor or trustee*, in whose possession it is found after the death of the testator, upon whom the tax is assessed, and who is called upon to pay it, and in fact did pay it here. These United States bonds so passed, and the tax was laid upon them, as appears from this record, *in the hands of this executor*.

In the *Sherman Case*, No. 459, which related to the passing of the same estate and the tax thereon

in the hands of the same executor, it appeared (Record, p. 2) that the estate amounted to \$1,235,571 —

“a considerable portion of which, to wit, at least one third thereof, consisted of what are commonly called Government bonds -- that is to say bonds issued by the Government of the United States under the authority of acts of Congress—and certificates of indebtedness of the Government of the United States issued under the provisions of acts of Congress, bearing interest, and which bonds or certificates of indebtedness this petitioner is advised and believes and charges the fact to be are not subject to assessment or taxation by the United States or by any State, and there is by virtue of the acts of Congress directing the issuing of such bonds and certificates of indebtedness a contract between the Government of the United States and the holders of such bonds and certificates of indebtedness that the same are non-taxable and non-assessable for the purposes of taxation.”

It then further appears that the tax was laid upon Murdock, as the executor of the will of Jane H. Sherman, deceased, in respect to the passing of said property, including said bonds (see the Schedule or Return made to the collector, and annexed to the complaint), and that he thereupon paid the total tax of \$36,827.53, of which sum \$8,969.02 was paid by, and—

“taken and deducted by said executor from the income due and payable to your petitioner [plaintiff in error] under and by virtue of the provisions of said will, from the share of said estate, including Government bonds, set apart by virtue of the provisions of said will, as the share of said estate from which the income is payable to your petitioner during his life, and if the said payment was lawfully required to be made by said executor, he, the said executor, was authorized by said act to pay the same from the funds of said estate, and in fact he did pay the same from the income of said estate pay-

able to your petitioner and deducted the same therefrom."

Record, pp. 2 and 3.

It further appears, by the twenty-fourth clause of the will of the testatrix (Record, p. 8, in No. 459), that there was devised to Murdock, as executor and trustee, one-third of the residuary estate in trust for the benefit of George D. Sherman, the plaintiff in error, for his life, and *it is this one-third, of which, it appears, these Government bonds constituted a part, which has been "set apart by virtue of the provisions of said will as the share of said estate from which the income is payable to your petitioner during his life," and from which share it appears that the executor "in fact did pay" the portion of the tax attributable to the passing of such share* (Record, p. 3).

The petitioner in the *Sherman Case* thereupon alleged that the tax was unconstitutional, unlawful and void, "and in so far as said tax has been imposed upon or collected from said executor *by reason of his ownership as executor of the interest in the estate of said deceased which consists of the Government Bonds above mentioned, the defendant has not right or authority to impose or assess any tax whatever upon the same*" (Record, p. 4).

In the *Murdock Case*, No. 458, the plaintiff charged that by reason of the premises, to which we have above referred in our quotations from the record in that case, "*the amount of said tax has been unlawfully exacted from him as executor of said estate*" (Record in No. 458, p. 8).

It is extremely difficult to conceive of a case, the record in which should have more clearly and explicitly presented this question than do the records in the cases at bar. The War Revenue Act imposes the tax upon *the executor and trustee* in respect to the "passing" of property which is found in his

charge and possession. The records in these cases show the fact to be that *the bonds in question were in the possession and charge of the executor, constituting a part of the property "passing" under the will of Jane H. Sherman, deceased.* It further appears that *a part of those bonds was actually set apart to and constituted a part of the residuary estate held in trust by this same executor for the benefit of George D. Sherman, the plaintiff in error in No. 459, and that the proportion of the tax, paid in respect to that part of the estate, was "in fact" deducted from the income of said trust belonging to said Sherman.*

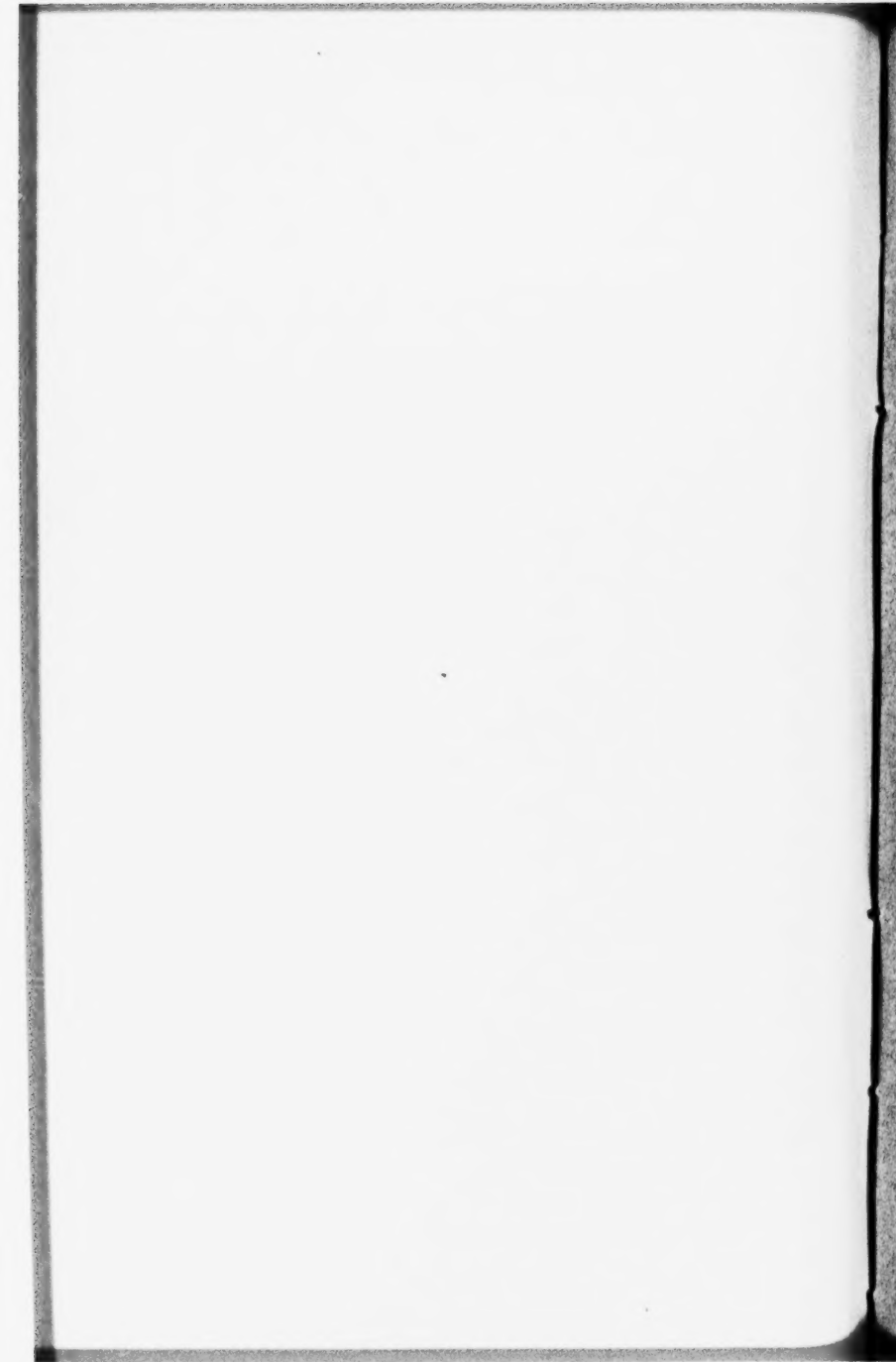
We, therefore, respectfully submit that these records are, not only amply sufficient to present the question heretofore argued in these cases, but are in point of fact absolutely free from any defect which can be made the basis of any objection, no matter how technical.

EVARTS, CHOATE & BEAMAN,
Attorneys for CHARLES F. SOUTH-
MAYD and other holders of
bonds.

CHS. F. SOUTHMAYD,
In Person.

WILLIAM V. ROWE,
Of Counsel.

*The record—(See petition, complaint & assignment of errors)
"Arises in question" the constitutionality of the War Revenue
Act, and, as a consequence, "this Court requires jurisdic-
tion of the entire case and of all questions involved in."
Horne v. U.S. 143 U.S. 570, 576-7.*



Office Supreme Court U.
S. C. No. 1123

MAR 2 1900

U. S. DEPT. OF JUSTICE

Pro Se

In the Supreme Court of the United States.

February 8, 1900.

GEORGE T. MURPHY, as ex-
ecutor, etc., of Jane H.
Bhatman, deceased,
Plaintiff in error,

No. 458.

JOHN G. WARD, Collector,
etc.,
Defendant in error.

GEORGE D. SHEEDMAN,
Plaintiff in error,

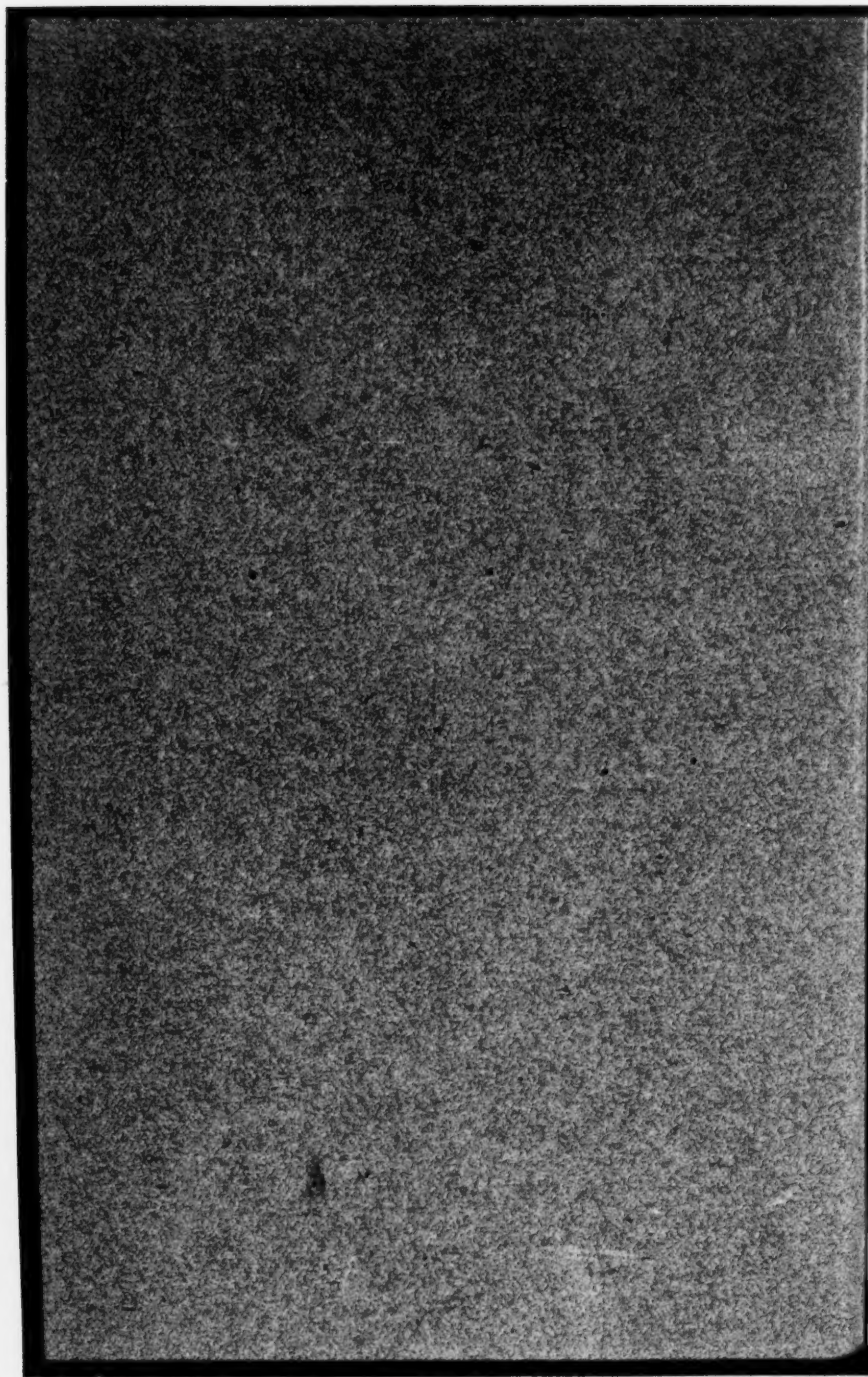
No. 459.

THE UNITED STATES,
Defendant in error.

Brief for Plaintiffs in Error under writ of the Court
of February 28, 1900.

CHARLES E. PATTERSON,

Of Counsel.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as ex- ecutor, etc., Plaintiff in error, v.	} No. 458.
JOHN G. WARD, Collector, etc., Defendant in error.	

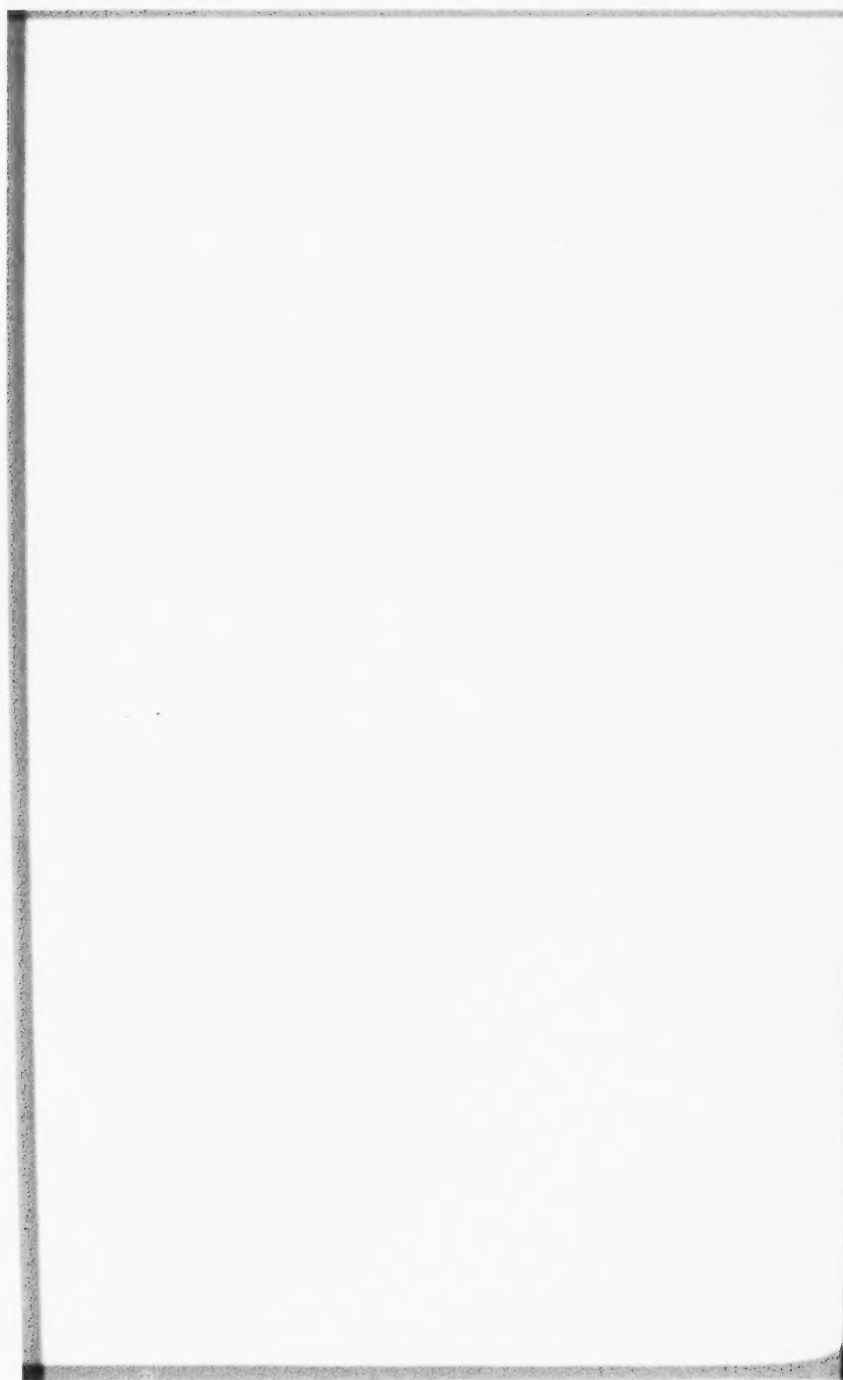
GEORGE D. SHERMAN, Plaintiff in error, v.	} No. 459.
THE UNITED STATES, Defendant in error.	

ERRATUM.

**Correction of Brief for plaintiffs in error filed under
rule of the Court of February 26, 1900.**

By a mistake of the printer in putting together
the matter of this brief, what appears as page 9
should be read as page 8 and what appears as page
8 should be read as page 9.

CHARLES E. PATTERSON,
of Counsel.



IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, as executor of Jane H. Sherman, deceased,

Plaintiff in error,

against

JOHN G. WARD,, United States Collector of Internal Revenue.

No. 458.

GEORGE D. SHERMAN,

Plaintiff in error,

against

THE UNITED STATES.

No. 459.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR,
UNDER ORDER OF THE COURT MADE THE
26TH DAY OF FEBRUARY, 1900.

(The Court has called for further briefs "on the construction of the act under consideration in respect of the question whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or the amount of the legacy.")

Upon the argument of these cases in court, the counsel taking part therein, both for plaintiffs in error, and for the government, were agreed in their construction of the statute in question, that the tax or duty imposed upon each legacy, or upon the amount received by each legatee, is measured by the volume of the estate, and not by the amount of the legacy. If there shall obtain a different construction, all the taxes imposed in the cases now before the court have been improperly assessed, and all the actions have been well brought, even though the constitutionality of the law in question shall be upheld. The result may be that the plaintiffs will not have the full relief sought, but must be awarded a modified relief.

It does not seem possible that there can be any other construction given to the statute, than the one recognized by the Commissioner of Internal Revenue, and heretofore conceded by all the counsel to be its true construction.

While it is the duty of the Court to construe doubtful language in a statute, so that the construction will not work mischief or injustice, it is not the duty of the Court to revise and rewrite statutes and to substitute constitutionally just and harmonious laws in the place of those enacted by the Congress, which are plainly unconstitutional, and whose injustice is, beyond question, the result of the deliberate intent of the Congress. Otherwise, this Court will usurp the prerogative of the Congress, and while the remedial result will be effected of removing unconstitutional features from a statute, by amendments written in by the Court, the functions of the law-making power will be infringed upon, and in effect taken away by the law-construing branch of the government.

In *Doe, Lessee of Poor, v. Considine*, 6 Wallace, 453,

in the opinion of the Court, *per* Mr. Justice Swayne, there occurs this, which expresses the position of counsel: "Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating we should legislate. This we have no power to do. Our function is "to execute the law, not to make it." Perhaps the word "execute," as here used, may be subject to some criticism or modification, for the Court *construes* the law, and *executes* it only when its process is required for that purpose.

It is not necessary in this case to carry well recognized rules to any extreme. The language of the statute in question seems to be so clear and so unmistakable, that any injustice that may result from imposing a tax upon a legacy proportioned the value of the estate of the testator, instead of proportioned to the amount of the legacy, is so apparent, that there can be no doubt that the Congress intended just exactly what the President approved of, and that is the injustice that is now complained of.

In the construction of statutes, undoubtedly the intent of the law-making power is first to be sought, and the efforts of the Court should be directed towards giving effect to that intention. "But a necessary qualification "has been annexed to that proposition; that the intention, to which such effect is to be given, must be such "an intention and object as the Legislature have used "fit words to express."

Potter's Dwarrris on Statutes, 192.

It is not a rule for the construction of statutes, as appears to have been contended for by the learned Solicitor General in his main argument, that because Congress could never have intended to pass an act void and inoperative on its face, therefore an unconstitutional or inoperative act of Congress must be rewritten by the Court in such language as will make it operative. The

language of the learned Solicitor General is this (pp. 30, 31, of original brief):

"The practical operation of the statute—the real nature of the exaction—is what the court will look to in determining whether the tax is direct or not. Is it not absurd to jump to the conclusion that Congress would do a wholly futile thing by levying an unapportioned tax upon personal property? Certainly Congress never intended to pass an act void and inoperative on its face. It was the design of Congress to pass a valid law, to pay a tax in accordance with the constitution. This it could do by taxing the privilege of transmitting the property; it could not do so by taxing the property itself."

In so far as the intent of the legislative body is subject of consideration in the interpretation of its acts, that intent must be ascertained from the language of the statute itself. If the language of the statute is of doubtful import, aid may be given to its construction by a consideration of the circumstances under which the enactment was made.

Now in this case, we have as part of the surrounding circumstances, one fact which is recognized in the title of the statute under consideration. The title is "An Act to provide ways and means to meet war expenditures, and for other purposes."

It is a matter of history, and is made matter of record by the statute itself, that at the time of this enactment a necessity was imposed upon the government of the United States to provide an extraordinary revenue to meet extraordinary expenditures, by reason of pending warfare. It may not be matter of official record, but it is a matter of current history, and a matter of which this Court cannot fail to take cognizance, that at the time this statute was enacted, there was a great popular—or if not popular, at least populist—outcry

against taxation being imposed so as to fall heavily upon persons possessed of small means, and exempting large estates from taxation.

For the present, without laying special stress upon the language of the statute, it is not too much to ask the Court to consider, that Congress, in enacting the statute in question, had intended to accomplish these two objects: (a) Raising of war revenue; (b) the imposing of the heavy burden of taxation for the purpose of the war revenue upon large estates.

Assuming the law in question to be constitutional, it was admirably adapted to accomplish the intent of the legislative body. The Court cannot ignore the fact that under the provisions of this act, even outside of sections 29 and 30, now under consideration, an enormous revenue has been raised for the purposes of the government, and sufficient to meet all of its extraordinary expenditures for purposes of warfare. The intent of the Congress to tax rich estates to the exemption of small ones, is clearly and unmistakably expressed in the language of the act now under consideration. Indeed, the language seems so clear, and so explicit, that it is almost impossible to reach any conclusion other than that it was the intent of Congress to impose the tax under consideration, with reference to the volume of the estate regardless of the amount of the legacies that might pass.

The construction that has been given to this statute by the Commissioner of Internal Revenue is in perfect harmony with the language of the statute, and has been recognized by every department of the government, and was recognized by all the counsel who took part in the argument of these cases.

Undoubtedly the Court has reached, or may reach, the same conclusion that counsel have, that the statute in this respect is unconscionable, unreasonable and unjust, and if these are sufficient reasons for a decision in favor of

the plaintiffs in error, the Court must also reach the conclusion that the statute is unconstitutional.

Although these may not, of themselves, be sufficient reasons for an adjudication that the law is unconstitutional, they are pertinent matters for the Court to consider in determining whether the law does not violate the *spirit* of the constitution, which seeks uniformity and equality of taxation, and therefore aid in determining a true construction of the *letter* of the constitution.

While the Court ought, in the harmonious workings of its separate department, in connection with the executive and legislative departments of the government, to seek to sustain those departments in all their acts and enactments, and while it should strain in every reasonable way to uphold an enactment of the Congress as constitutional, yet where the enactment is clearly unconstitutional, this Court is not called upon to violate its conscience, or to rewrite statutes, so as to make them what the Congress might have constitutionally provided.

To come now to a critical examination of the language of the statute in question. Section 29 says: "Any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of SUCH PERSONAL PROPERTY AS AFORESAID, shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or territory * * * to any person or persons, or to any body or bodies, political or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: *Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed*

"in value the sum of twenty-five thousand dollars, the tax shall be:

"First. Where the person or persons entitled to any beneficial interest in said property shall be the lineal issue or lineal ancestor, brother, or sister, to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

Then the act goes on to provide in the second, third, fourth and fifth subdivisions, for a different rate of taxation, according to the remoteness of the relationship of the person entitled to receive such beneficial interest, or in accordance with the lack of kinship of the recipient of the property to the deceased.

Then a further provision follows, that "where the amount or value of *said property* shall exceed the sum of twenty-five thousand dollars, but not exceed the sum or value of one hundred thousand dollars, the rates of *duty or tax* above set forth shall be multiplied by one and one-half," and so the rate goes on increasing, until "where the amount or value of SAID PROPERTY shall exceed the sum of one million dollars, such rates of *duty* shall be multiplied by three."

If this Court is bound by any rules of grammar, in its construction of statutes, it is not possible so to construe this statute, as to find otherwise than that the tax here imposed is proportioned to the value of the property which passes from a testator to an administrator, executor or trustee. No other possible construction can satisfy rules of grammar. If the courts shall hold that there was a legislative intent to make the tax to be measured by the amount of the legacy, instead of by the amount of the estate of the testator, such intent is not manifested in anything which the Congress has said. If this Court shall say that it would have been constitutional for the

tion of this law, upon an equality with all the multi-millionaires of the country. Persons with less than a million dollars are commiserated and pitied in accordance with the smallness of their means, so that if a party has not more than ten thousand dollars at the time of his death, his estate will escape government taxation.

Supposing the contention should prevail that the tax imposed by this statute is measured by the amount of the legacy, and not by the amount of the estate of the decedent, any party owning upwards of ten thousand dollars at the time of his death may provide a means of escape for his estate from the payment of any tax whatever under this statute, and yet give all his property to a single legatee or beneficiary. Whatever the amount of the estate, he may create separate trustees for each \$9,999 thereof, and give each separate parcel of his estate to the amount of \$9,999 thereof, to a separate trustee, for the benefit of one particular beneficiary.

If the tax be imposed upon the particular legacy, or upon the trustee with reference to the legacy which the particular trustee has, and is not imposed upon the bulk of the estate, the estate of a millionaire may be as free from this government tax as the estate of one not worth more than ten thousand dollars.

It is not probable that the members of the House of Representatives, and of the Senate of the United States, who voted for this particular enactment, fully considered the effect of their votes, or thoroughly understood the consequences of their action. If so, it is doubtful whether they would have said that the Saratoga Hospital must pay \$750 to the government for receiving a legacy of \$5,000 from Mrs. Sherman, merely because she was worth more than \$1,000,000, while if she had not been worth more than \$10,000 the Hospital might have received that same legacy without paying a cent of tax.

It is certain, however, that the legislative intent was

Congress to have passed a statute imposing a tax upon legacies varying in amount according to the amount of the legacy, and varying in amount according to the degree of kinship, or because of lack of kinship of the beneficiary to an intestate, it may be reasonably said that no such question has been before this court.

If the Justices of this Court shall be of opinion that such a law would be constitutional, it is not within the province of this Court to enact such a law. To say that this law means what it has not said, and to say that there shall be a tax imposed upon legacies according to the amount of the legacy, and according to the degree of kinship, or lack of kinship, will be for this Court to arrogate to itself legislative powers, and to impose a tax which the Congress in its tax-making power has not imposed.

It will be a travesty upon justice, if this Court shall adopt the line of reasoning of the learned Solicitor General, and say that Congress could not be assumed to intend to pass an unconstitutional or inoperative law, and therefore this Court will modify or remake the law which was enacted by the Congress, and substitute for what is unconstitutional a law that shall be constitutional.

In saying this it is not intended to concede, and it is not conceded that the law would be constitutional, even if it apportioned the tax according to the amount of the legacy, and not according to the volume of the estate.

To put a construction upon the statute, that the tax is to be proportioned to the amount of the legacy, and not to the volume of the estate, would subvert entirely the intent of the Congress. Nothing can be clearer from the language of the statute, than that it was intended to make a distinction against large estates, and to impose a heavy tax upon those who should die rich. The line of demarcation is drawn at millionaires. A man worth a million dollars at the time of his death is, in contempla-

expressed in the language which it used, and because Mrs. Sherman was worth more than a million dollars at the time of her death, it was the intent of the Legislature that the Saratoga Hospital should pay \$750 to help carry on the wars of the United States. The injustice and unreasonableness of the enactment are not sufficient grounds for the Court to reverse the action of the Revenue Department in collecting this tax, but they are subjects worthy of the consideration of this Court, in determining the question whether the Constitution is so framed as to permit such injustice to be done.

In the record in the Sherman case, there is incorporated a transcript of the assessment sheet, by which the government imposed its tax upon the Sherman estate. This sheet was prepared in the office of the Commissioner of Internal Revenue, and undoubtedly was advised by the law advisers of the government. It seems to be strictly in accordance with the detailed provisions of the statute in question. By reason of the assessment made upon that sheet, a tax has been imposed upon the different legatees under Mrs. Sherman's will, the rate of which has been determined by the value of the whole of Mrs. Sherman's estate, and not by the amount of legacies given to the different legatees. If a contrary contention should prevail, and it should be held that the tax should have been apportioned according to the value of each legacy, and the degree of kinship of the legatee, sufficient ground is afforded for a reversal of the judgment, even though this Court should hold the law to be constitutional.

At the same time, for the reasons stated upon the argument of this case, and in the briefs heretofore filed, it is contended that the whole law is unconstitutional, even though this Court should construe the statute differently from what it has ever heretofore been construed.

While there may be no cases decided by this Court,

involving this direct question, and which may aid the Court in a construction of this statute, the attention of the Court is called to the case of *Matter of Hoffman* (143 N. Y. 327), in which almost the identical case was decided under a transfer act of the State of New York. (Chap. 399, Laws of 1892.) It is probable because of the decision in this case of Hoffman, that the act of 1892 has been revised.

The language of that statute is not as explicit as in this case, that the value of the whole estate was the determining question in affixing a tax.

The Court of Appeals of the State of New York held that, under that statute, the limitation applied to the aggregate value of all property transferred, and not to the separate value of each several transfer.

There is a similar decision under the same statute, "*In the Matter of the Estate of Samuel Hall, deceased*" (88 Hun, 68), and in which the syllabus is:

"The transfer tax, created by chapter 399 of the Laws of 1892, is imposed by the terms of the act upon the aggregate of the property which descends from the decedent, and not upon the separate parcels or shares into which it may be divided:

"A share less in amount than \$500 is taxable under the act, if all property of the deceased was of the value of \$500 or over."

These cases may not be regarded as authority by this Court, but they seem to throw some light upon the construction contended for. They are in the line of the claim that is now made, and, it is believed, add some strength to a position that, even without their aid, would be regarded as impregnable.

There are authorities in this Court which bear upon the question of the construction of statutes, and are pertinent to the present inquiry.

In *Ruggles v. Illinois* (108 U. S. 526), at page 534,

in the opinion of Mr. Chief Justice Waite, reference is made to a general maxim of interpretation applied to the construction of a statute, which is as follows:

"But Vattel's first general maxim of interpretation 'is that *'it is not allowable to interpret what has no need 'of interpretation,'* and he continues: 'When a deed "is worded in clear and precise terms—when its meaning is evident and leads to no absurd conclusion—"there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict "or extend it, is but to elude it.' Vattel's Law of Nations, 244. Here the words are plain and interpret themselves."

In *Aldridge v. Williams* (3 How. [U. S.] p. 24), the language of Mr. Chief Justice Taney is as follows:

"The law, as it passed, is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *Lake County v. Rollins* (130 U. S. 662), the Court, by Mr. Justice Lamar, made use of this language:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case there is a well settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in

"adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. *Newell v. People*, 7 N. Y. 9, 97; *Hills v. Chicago*, 60 Illinois, 86; *Denn v. Reid*, 10 Pet. 524; *Leonard v. Wiseman*, 31 Maryland, 201, 204, *People v. Potter*, 47 N. Y. 375; *Cooley, Const. Lim.* 57; *Story on Const. Sec.* 400; *Beardstown v. Virginia*, 76 Illinois, 34. So also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *United States v. Fisher*, 2 Cranch, 358, 399; *Doggett v. Florida Railroad*, 99 U. S. 72."

In *Yerke v. United States* (173 U. S. 439, 442), this Court said, per Mr. Justice McKenna: "The rule is elemental, that language which is clear needs no construction."

In *United States v. Philbrick* (120 U. S. 52), in construing a statute, great force was given to the fact that the executive department, upon whose officers had been imposed the duty of executing the statute, had placed a particular construction upon it. In the opinion of the

Court, delivered by Mr. Justice Harlan, there is this language (p. 59):

"A contemporaneous construction by the officers upon
"whom was imposed the duty of executing those stat-
"utes is entitled to great weight, and since it is not clear
"that that construction was erroneous, it ought not now
"to be overturned. See *Hahn v. United States*, 107
"U. S. 405, and *Brown v. United States*, 113 U. S. 571,
"and authorities cited in each case."

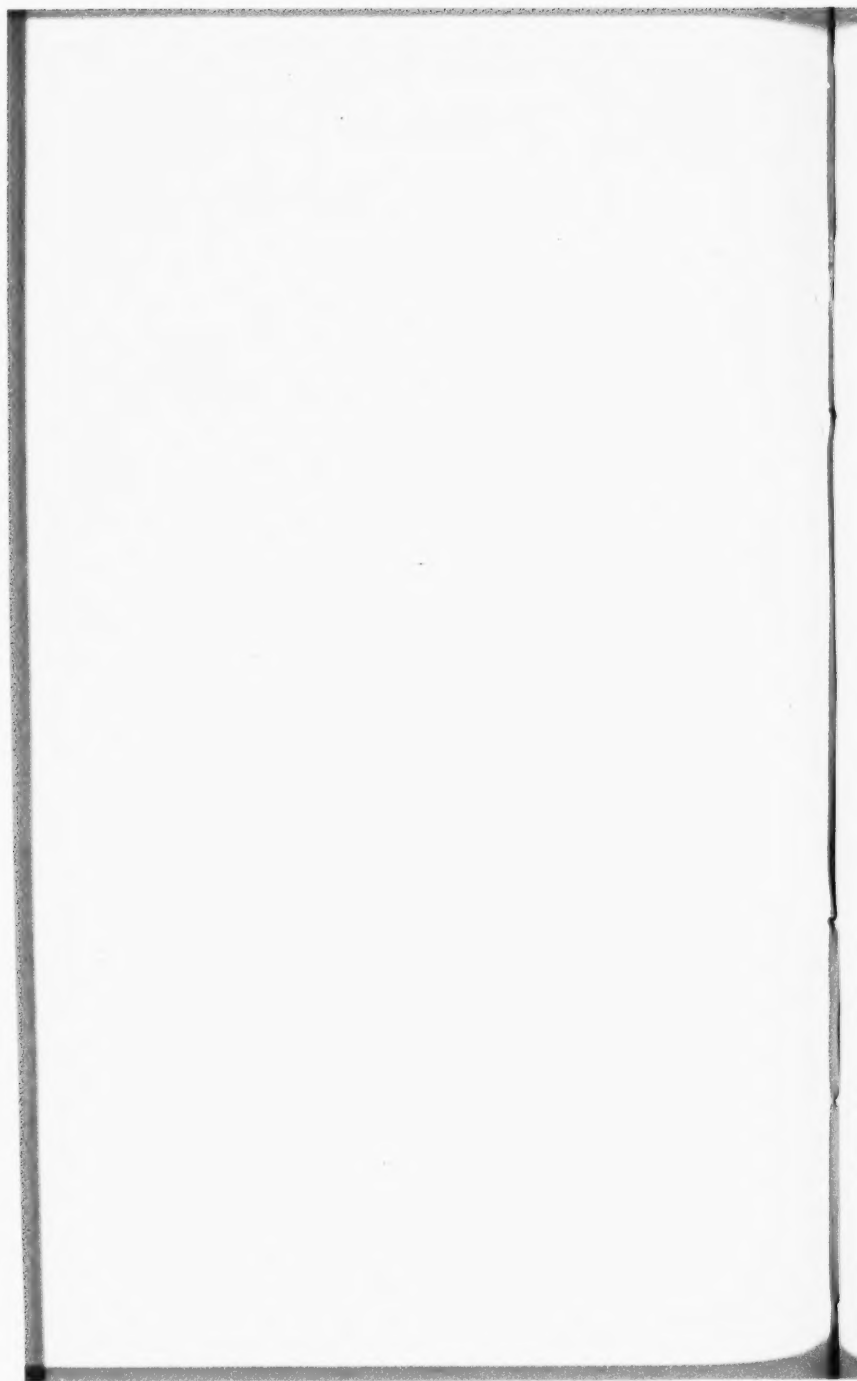
In *United States v. Hill*, 120 U. S. 169, there is this language used by Mr. Justice Blatchford, in giving the opinion of the Court:

"In *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210,
"it was said: 'In the construction of a doubtful and
"ambiguous law, the contemporaneous construction of
"those who were called upon to act under the law, and
"were appointed to carry its provisions into effect, is
"entitled to very great respect.' To the same effect are
"*United States v. Dickson*, 15 Pet. 141, 145; *United*
"*States v. Gilmore*, 8 Wall. 330; *Smythe v. Fiske*, 23
"Wall. 374, 382; *United States v. Moore*, 95 U. S. 760,
"763; *United States v. Pugh*, 99 U. S. 265, 269; *Hahn*
"*v. United States*, 107 U. S. 402, 406; and *Five per*
"*cent Cases*, 110 U. S. 471, 485. In the case of *Brown*
"*v. United States*, 113 U. S. 568, the same doctrine was
"applied, the cases in this Court on the subject being
"collected, and it being said that a 'contemporane-
"ous and uniform interpretation,' by executive
"officers charged with the duty of acting under
"a statute, 'is entitled to weight' in its construction, 'and
"in a case of doubt ought to turn the scale.' A still
"more recent case on the subject is *United States v. Phil-*
"*brick*, ante, 52, where this language is used: 'A con-
"temporaneous construction by the officers upon whom
"was imposed the duty of executing those statutes is
"entitled to great weight; and since it is not clear that

“that construction was erroneous, it ought not now to
“be overturned.’ ”

In connection with the two cases last cited, the Court should take into consideration that the executive departments placed a practical construction upon the statute in question, immediately after it became a law, and when it may not be surmised or conjectured that there was any reason why the executive departments, aided by the law department, should not attempt to construe the law exactly as it was understood to have been enacted by the Congress. To undertake to spell out a different construction than was then put upon it by the intelligent officers charged with its execution, in order that by reason of a strained construction, contrary to the meaning of the language used, and contrary to all grammatical and rhetorical construction of language, an unintended statute may be evolved that will be consistent with the provisions of the constitution, is unreasonable, and abhorrent to all the principles which govern this Court in its administration of justice.

CHARLES E. PATTERSON,
Of Counsel.



No. 458.

Office Supreme Court U. S.
FILED

MAR 14 1900

Op. of Hilburn on question pro-
IN THE *founded by Court*
SUPREME COURT OF THE UNITED STATES.

Filed Mar. 14, 1900.

GEORGE T. MURDOCK

VS.

JOHN G. WARD, COLLECTOR, ETC.

458.

Memorandum in support of the contention that the tax on legacies under the War Revenue Act of 1898 is determined by the amount of the legacy and not by the amount of the whole personal estate.

The construction of the Act, which I am persuaded is the true one, is that wherever the phraseology "the total amount of such personal property" is used in Section 29 to fix the rate of the tax, it refers to the personal property constituting any legacy or distributive share, and not to the personal property constituting the whole estate. At first blush that phraseology may seem to apply wherever used to the whole estate in the hands of the administrators, executors or trustees; but a closer examination decidedly favours the construction which relates it to the personal property constituting any legacy or distributive share. The section reads as follows: "That any person or persons having in charge or trust as administrators, executors or trustees any legacies or distributive shares arising from personal property, where the whole amount of such

personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing . . . from any person . . . to any person or persons, etc., shall be and hereby are made subject to a duty or tax . . . as follows, that is to say : where the whole amount of said personal property shall exceed in value . . . the sum shall be, etc." Does that mean, giving the language its natural significance, the whole amount of the personal property constituting all the legacies or distributive shares in their hands passing to all the legatees, or the whole amount of the personal property passing from a testator to any legatee? The latter seems to me its clear purport.

It is to be observed that it is only legacies or distributive shares arising from personal property that are taxable. Legacies or distributive shares arising from real property or the proceeds of real property are not taxable. That limitation was the reason for the insertion of the phrase "arising from personal property," which runs through the Act and introduces what ambiguity there is. But for that limitation it would have been unnecessary to qualify the terms "legacies" and "distributive shares" at all. It is an important consideration that the real reason for introducing the phrase "personal property" was to limit the tax to legacies and distributive shares arising from personal property, and not to express the idea that the whole personal estate was the measure of the tax.

The next idea to be expressed was that only legacies or distributive shares arising out of personal property over a certain amount were to be taxed, and that was accomplished by the phraseology "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, etc." The reason for that cumbersome phraseology was evidently the

presence of the language which had been used to confine the taxation to legacies and distributive shares arising out of personal property. It is only when the whole amount of personal property constituting a legacy or distributive share exceeds ten thousand dollars that the tax is payable.

Then follow the provisions for the rate of taxation on such legacies or distributive shares exceeding that amount. At this point the precise phraseology of the Act is to be particularly observed. It is that "any legacies or distributive shares arising from personal property . . . passing . . . from any person . . . to any person or persons . . . are hereby made subject to a duty or tax . . . as follows: Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be, etc." Does not that clearly mean—any legacy or distributive share arising from personal property, passing from one person to another, by will or intestacy laws, shall be subject to a given tax where the whole amount of said personal property—that is, the personal property passing from *one person* to *another* or in other words, each particular legacy or distributive share—shall exceed in value the sum of, etc. ?

I think that as between a construction which fixes the amount of the tax according to the amount of the estate, making the Act very unjust in its operation, and, as is claimed, unconstitutional, and a construction which fixes the rate of taxation according to the amount of the legacy, making the Act much more fair and just in its operation, the latter should be chosen. Strongly confirmatory of this position is the principle underlying this tax. The basis of the tax is the right or privilege of taking under a will or intestacy laws. The right or privi-

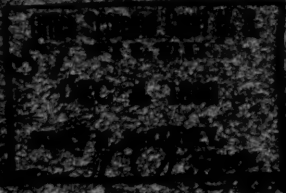
lege is the right or privilege of the person who takes. The just measure of the taxation of that right or privilege as a taxable entity is properly governed by certain considerations founded on real and substantial distinctions. To classify legatees for purposes of taxation according to their relationship to the testator is natural and just. To classify them according to the amount of the benefit received under the right or privilege is also, it may be assumed, natural and just. But to classify them according to the size of the estate out of which the legacies are payable is obviously unjust and utterly unreasonable. To tax the son of one man more than the son of another man on legacies of the same amount because the estate of one father is larger than that of the other is a measure devoid of reason and principle, considering that the taxable entity is precisely the same in both instances—the benefit derived by each from the right or privilege of taking under a will. The same is true of the various classes of collaterals in the same degree and the class of strangers. Courts will not be inclined to give the Act that intolerable operation when another construction which preserves the underlying principle of the tax is open to them.

This question has not been passed upon in the case of *High v. Coyne, Collector*, 93 *Fed. R.*, No. 540, nor has it yet been explicitly raised that I know of. It is true that the debates in Congress indicate that the prevailing idea was that the graduation of the tax was according to the amount of the whole estate, but that is not a consideration which has much weight in the construction of statutes when there are serious questions of reasonableness, justice and constitutionality involved.

JOHN G. MILBURN,

Of Counsel for Various Legatees.

Chas. J. ...
Chas. J. ...



Chas. J. ...
Chas. J. ...

In the Supreme Court of the United States

October Term 1894

SHIRLEY T. HIGH and JOHN W. HIGH
appellants.

v.
T. E. COYNE, as executor of William
Coyne, internal revenue for the first dis-
trict of Illinois, and Ellen T. High, as
executrix of James L. High, deceased.

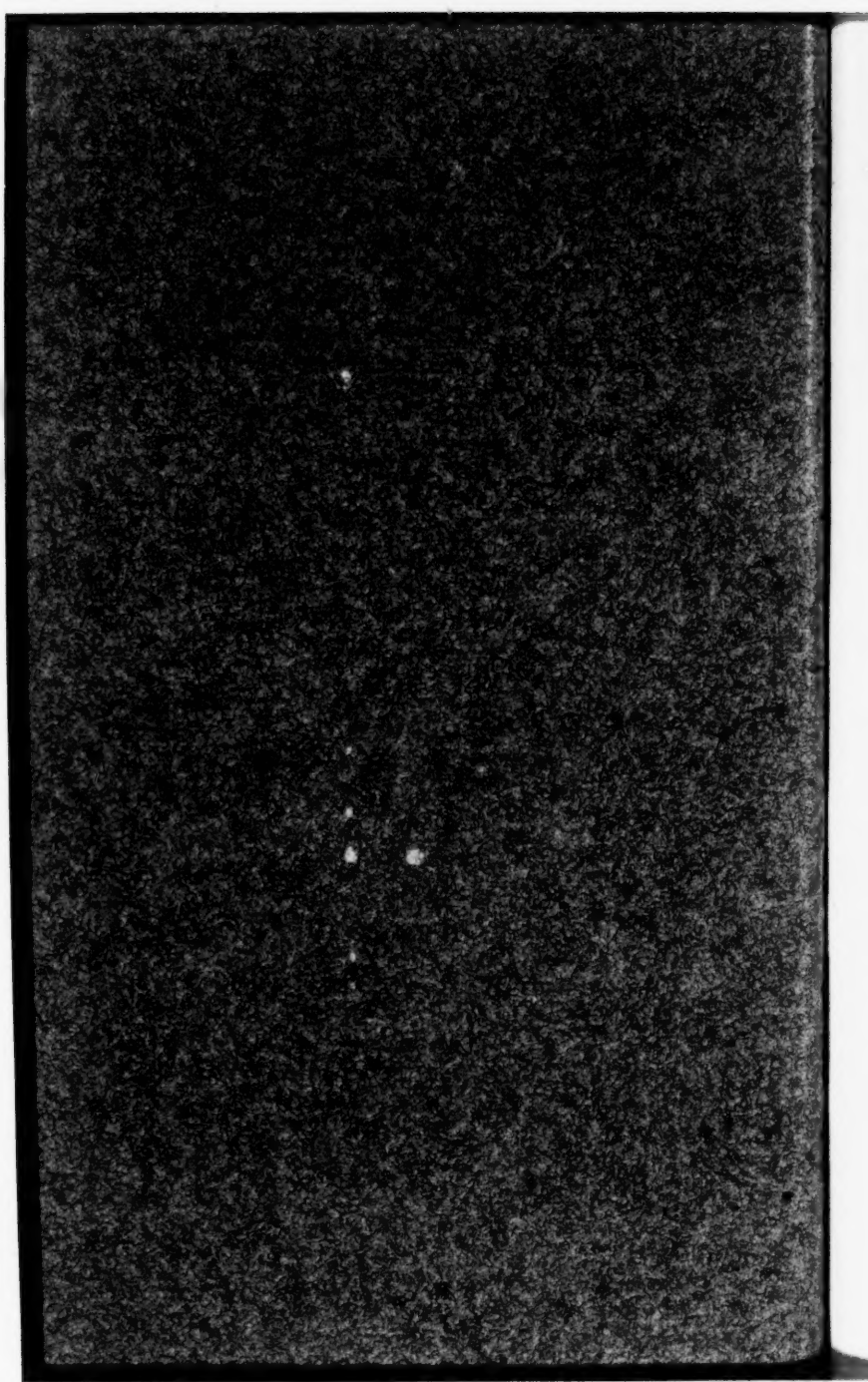
No. 226.

First Property Insurance Trust, and
First Deposit Company, created under the
will of Daniel Long, deceased, plaintiffs in
error.

No. 431.

FRANCIS A. McCLAIN

BEFORE THE UNITED STATES
COLLECTORS



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JESSIE M. HIGH, appellants, v. F. E. COYNE, AS COLLECTOR OF UNITED States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of James L. High, deceased.	} No. 225.
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THE FIDELITY INSURANCE, TRUST, AND Safe Deposit Company, executor under the will of Daniel Craig, deceased, plaintiff in error, v. PENROSE A. McCLAIN.	} No. 451.
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BRIEF FOR THE UNITED STATES
COLLECTORS.

STATEMENT.

QUESTION.

The question raised is the constitutionality of the inheritance tax or duty provided by sections 29 and 30 of the act of June 13, 1898. (30 Stats., 448.)

THE CASES.

In case No. 225, two of the legatees of High, deceased, brought suit in the circuit court of the United States for the northern district of Illinois against the executrix and the collector of internal revenue ; against the former to restrain her from returning to the collector a statement of the legacies held by her as executrix, and from paying any tax thereon ; against the latter to enjoin him from collecting the tax. The circuit court (Seaman, judge), in an opinion (Rec., p. 10), sustained a demurrer to the bill. From this decree the appellants appealed to this court.

In case No. 451, the Fidelity Insurance, Trust and Safe Deposit Company, as executor under the will of Craig, deceased, brought suit in the common pleas court for the county of Philadelphia, against McClain (the collector of internal revenue) to recover back \$168.75, the tax assessed under this act. The case was removed to the circuit court of the United States for the eastern district of Pennsylvania, a demurrer to the petition sustained (Dallas and McPherson, judges, Rec., p. 13), and error sued out from this court.

In the petition and brief filed by this company in this court it is stated that the approximate Federal inheritance tax assessed against the company as executor and administrator of estates amounts to \$361,725.

THE LAW.

The following are the sections of the act involved, the italics being mine :

LEGACIES AND DISTRIBUTIVE SHARES OF PERSONAL PROPERTY.

SEC. 29. That *any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the interstate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect, in possession or enjoyment, after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows, that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:*

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who dies possessed, as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who dies possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of a collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied

by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; *and every executor, administrator, or trustee, before payment and distribution to the legatee, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list,*

or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive

custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: *Provided*, That in all

legal controversies where such deed or title shall be subject to judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth and that the requirements of the law had been complied with by the officers of the Government.

The foregoing sections (29 and 30) are identical in their provisions with sections 124 and 125 of the act of June 30, 1864 (13 Stats., pp. 285, 286), excepting the exemption to estates is raised from \$1,000 in actual value to \$10,000 in actual value, and the progressive rate, based on the value of the estate, contained in the concluding paragraph of section 29, is added. It is to be observed, therefore, that the provision for a graduated rate, based upon the rate fixed by the degree of consanguinity, may be rejected and an act taxing legacies and distributive shares be left complete in all its provisions. In other words, the present law is the old law in its entirety, as it was executed without objection from 1862 to 1870, with the addition of a progressive rate computed upon the rate fixed by consanguinity.

POINTS MADE AGAINST THE LAW.

The appellants in No. 225 contend:

1. The United States can not tax the right of inheritance which is created by the State. To permit this would be to permit the General Government to abridge or destroy a privilege lawfully conferred by the State.

2. The tax is direct and, being unapportioned, is unconstitutional because:

- (a) It purports to be upon the legacy or distributive share, and not upon the right to inherit or take by will.

(b) It does not fall within the definition of an "excise, duty, or impost."

3. If an excise, there is a lack of uniformity both because of the exemption created and in the classes defined.

The plaintiff in error in No. 451 contends:

1. Congress has no power to regulate inheritances within the States. The act must therefore be sustained as a valid exercise of the Federal taxing power.

2. The tax is not an excise upon the right to receive a legacy or distributive share measured by the amount received, but a tax upon the property in the hands of the executor or administrator, measured by the amount of the estate after paying debts, the rate increasing by a graduated scale, whereby estates are divided into six classes.

3. A tax imposed upon property as such, not being an excise upon the right to receive the legacy or distributive share, is a direct tax and must be apportioned.

4. If the tax be regarded as an excise, Congress has failed to follow the rule of uniformity by directing that the tax be levied in accordance with a graduated scale whereby the rate increases as estates pass from a lower to a higher class for assessment, the line of demarcation between the classes being simply a variation in the aggregate net amount of the estate of a decedent.

5. The rule of uniformity is not satisfied by a mere geographical uniformity. A uniform rate upon the same subject-matter, wherever situated, is necessarily involved.

6. To justify classification for taxation there must be substantial differences between the subject-matters which are placed in the several classes. While the courts will

not review a reasonable exercise of the legislative discretion, they have not hesitated to declare statutes void which, if upheld, would involve a fraud upon the power.

7. A classification, the only basis of which is that the unit of taxation is found with certain other units of specified number in a common ownership, is without reason—nay, more, it violates the fundamental American principle that the law makes no distinction between rich and poor.

POINTS MADE IN FAVOR OF THE LAW.

On behalf of the law, I submit:

1. Where the constitutionality of a law is involved, every possible presumption is in favor of its validity. A revenue act of Congress should not be lightly and unadvisedly set aside. The power to tax is the one great power upon which the whole national fabric is based.

2. The Constitution confers upon Congress the taxing power. With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

3. In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in adjusting and distributing equitably the burdens of government. In so doing Congress has a right to recognize existing conditions. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power. It is not necessary that Congress should create the right or confer

the privilege in order to tax it. If enjoyed, it is enjoyed under the protection of the Nation as well as of the State.

4. The constitutionality of a law making an exaction for the purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

5. This exaction is not a direct tax upon the estate, but a duty or excise upon the right or privilege of the owner of property to transmit it on his death by will or descent to certain persons. This right or privilege, while not created or conferred by the United States, is enjoyed under its protection and may be taxed for the support of the Government. The executor, administrator, or trustee is made subject in the first instance to the payment of the duty, with a right to reimbursement in the settlement of his accounts. It is the passage, not the possession of property, which determines the duty. While the property is the subject of the assessment the privilege is the subject of the tax.

6. This excise is uniform because it operates with the same force and effect in every place where the subject of it is found. Wherever the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity is enjoyed, the same duty is laid and collected. The classification of the privileges taxed made by the act is proper, because each class has an inherent characteristic which distinguishes it from the other classes and justifies the tax laid, namely, the value of the property transmitted and the degree of kinship of the persons to whom it goes.

ARGUMENT.

I.

Where the constitutionality of a law is involved, every possible presumption is in favor of its validity. A revenue act of Congress should not be lightly or unadvisedly set aside. The power to tax is the one great power upon which the whole national fabric is based.

The rule to be followed where the validity of a Federal tax law is assailed is stated with clearness and force by Mr. Justice Peckham, speaking for the court in the case of *Nicol v. Ames* (173 U. S., 509, 514):

It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the lawmaking power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly true of a revenue act of Congress. The provisions of such an act should not be lightly or unadvisedly set aside, although if they be plainly antagonistic to the Constitution it is the duty of the court to so declare. *The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.*

II.

The Constitution expressly confers upon Congress the taxing power. With the exception and under the limitations of the Constitution, the taxing power reaches every subject of taxation.

The power which Congress exercised in levying the tax now before the court is found in section 8 of Article I of the Constitution, which reads :

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

Aside from the requirement of uniformity as to duties, imposts, and excises, the only limitations on the power of taxation contained in the Constitution are found in the fourth and fifth clauses of section 9 of Article I, which read :

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

The power to tax is an essential attribute of sovereignty. Without revenue, no government can exist. Within the limitations fixed by the Constitution, the mode of exercising the taxing power is within the discretion of Congress. The breadth of the taxing power under our Constitution is well described by Mr. Chief Justice

Chase, speaking for the court, in the *License Tax Cases* (5 Wall., 462, 471):

The power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress can not tax exports, and it must impose direct taxes by the rule of apportionment and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

And, again, by Mr. Justice Swayne, speaking for the court, in *Pacific Insurance Company. v Soule* (7 Wall., 433, p. 443):

Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the Government.

Speaking of the character and extent of the power of taxation in the States, this court, Mr. Justice Field delivering the opinion, said in the case of the *State Tax on Foreign-held Bonds* (15 Wall., 300, 319):

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to

them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

III.

In executing the taxing power Congress may, through classification, select the subjects of taxation, and thus use its discretion in adjusting and distributing equitably the burdens of government. In so doing, Congress has a right to recognize existing conditions. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power. It is not necessary that Congress should create the right or confer the privilege in order to tax it. If enjoyed, it is enjoyed under the protection of the Nation as well as of the State.

In the recent cases of *Magoun v. Illinois Trust and Savings Bank* (170 U. S., 283) and *Nicol v. Ames* (173 U. S., 509) such an elaborate presentation was made to the court of the cases upholding the right of Congress and the States, through classification, to select the subjects of taxation, and thus exercise a lawful discretion in

adjusting and distributing equitably the burdens of government, that it seems to me unnecessary to cite them here again.

The plaintiff in error in No. 451 contends that Congress has no power to regulate inheritances within the States, and the act must therefore be sustained as a valid exercise of the Federal taxing power. With this I am inclined to agree. But I wholly dissent from the position taken by the appellants in No. 225, that because the right of inheritance is the creature of the State, the General Government can not tax without unlawfully abridging or destroying it. In order that the United States should be able to tax a privilege, it is not necessary that the Federal Government should confer it; it is sufficient if the privilege exist. In the selection of subjects of taxation Congress has the right and it is its duty to recognize existing conditions. With the exceptions and under the limitations of the Constitution the Federal taxing power is absolute and supreme; it reaches every subject of taxation. Rights, privileges, and facilities, however conferred, may be taxed if so enjoyed as to bring them properly within the cognizance of the Federal taxing power.

In *Nicol v. Ames* (173 U. S., 509) it was insisted that the tax sustained in that case could not be upheld as a tax upon a privilege, because the seller on an exchange enjoys no privilege conferred by the Federal Government. Sales on an exchange within the limits of a State are subject to the regulation of a State. If any privilege is enjoyed, it is one either conferred by the State or enjoyed under its laws. The Federal Government giving nothing in the way of a privilege, it was contended it could charge

nothing in the way of a tax. The Government contended on the other hand that although the exaction could not be regarded as a price for a privilege conferred, it might properly be considered as a tax *on* a privilege enjoyed. Congress, in making the exaction, had in view the fact that the seller on an exchange or similar place enjoys peculiar privileges and facilities, which are of value, and may therefore be taxed. This view the court sustained, and in doing so, it seems to me settled conclusively that the United States may tax a privilege enjoyed although it does not confer that privilege.

The following extracts from the opinion of Mr. Justice Peckham, speaking for the court, are of interest in this connection (173 U. S., p. 516):

In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature and how they operate; and what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties to the same kind of a transaction. Having the power to recognize these various facts, it must also follow that *Congress is justified, if not compelled, in framing a statute relating to taxation, to legislate with direct reference to the existing conditions of trade and business throughout the whole country and to the manner in which they are carried on.*

We think *the tax is, in effect, a duty or excise laid upon the privilege, opportunity, or facility offered at boards of trade or exchanges for the transaction of the business mentioned in the act.* It is not a tax upon the business itself which is so transacted, but it is a duty upon the facilities made use of and actually employed in the transaction of the business, and separate and apart from the business itself. It is not a tax upon the members of the exchange nor upon the membership therein, nor is it a tax upon sales generally. The act limits the tax to sales at any exchange, or board of trade, or other similar place, and its fair meaning is to impose a duty upon those privileges or facilities which are there found and made use of in the sale at such place of any product or merchandise. (P. 519.)

In our judgment a sale at an exchange does form a proper basis for a classification which excludes all sales made elsewhere from taxation. If it were to be assumed that taxes upon corporate franchises or privileges may be imposed only by the authority that created them, it does not follow that no privilege or facility can be taxed which is not created by the government of a State or by Congress. *In order to tax it the privilege or facility must exist in fact, but it is not necessary that it should be created by the Government.* (P. 521.)

A tax upon the privilege of selling property at the exchange, and of thus using the facilities there offered in accomplishing the sale, differs radically from a tax upon every sale made in any place. The latter tax is really and practically upon property. It takes no notice of any kind of privilege or facility, and the fact of a sale is alone regarded. *Although not created by Government, this privilege or*

facility in effecting a sale at an exchange is so distinct and definite in its character, and constitutes so clear and plain a difference from a sale elsewhere, as to create a reasonable and substantial ground for classification and for taxation when similar sales at other places are untaxed. (P. 521.)

A class separated from the rest of the community through the enjoyment of lucrative privileges, from whatever source received, may be selected by Congress for special taxation, not because the United States conferred the privilege, but because, among other things, through having them such persons are better able to stand a tax. It is in this way that an equality of burdens is maintained. The changing conditions in business and in society, through continual commercial development, are constantly creating new classes which Congress makes use of in equalizing the burdens of government. The war-revenue act is full of illustrations of this truth.

For instance, the second section imposes certain special taxes. It lays taxes on bankers, not simply on national banks, but on State banks and private banks, which receive their privileges and franchises from the States. The banks are recognized as an existing class, enjoying certain privileges, however conferred, and therefore able to pay a special contribution to the Government.

The same section (par. 2) taxes stockbrokers; (par. 3) pawnbrokers; (par. 4) commercial brokers; (par. 5) custom-house brokers. These are occupation taxes, not levied because the Government has a right to regulate these callings, but because the business justifies the exaction of a special contribution.

The same section (par. 6) levies a tax on proprietors of theaters, museums, and concert halls; not on all proprietors of such places, but only those in cities having more than 25,000 population. Theaters, museums, and concert halls in cities situated in the States are under the police power of the States, which is usually exercised by the municipalities. Ordinarily the municipalities require such places to pay a license tax, which has been sustained by the State courts on the ground, partly, that the State has the power to regulate such places and therefore to tax them. Congress, which has no power to regulate them, taxes them simply because it regards them as proper existing subjects of taxation.

Under this same act special taxes are levied upon insurance—life, marine, fire, casualty, and guaranty—with exemptions in favor of fraternal, beneficiary, and cooperative organizations. The business of insurance is peculiarly within the control and regulation of the States, yet the Government has and exercises the right to tax it, and in taxing to classify and exempt.

I might go through this act and the tax laws of the United States in further illustration of this principle.

In short, though a privilege be received from a State, it is enjoyed under the protection of the United States as well as that of the State. The maintenance of the National Government is essential to the preservation of the States and the protection of the rights of person and property enjoyed by the citizens of the States, who are also citizens of the United States. Congress taxes the people of the State because the General Government is one formed by the people of the United States and pledged to provide

for their common defense and general welfare. The people, their property, their privileges, their occupations, their business, their transactions, and acts may all be taxed, because they all exist under the protection of the General Government and receive the benefits flowing from it.

IV.

The constitutionality of a law making an exaction for purposes of revenue depends upon its operation and effect, and not upon the form it may be made to assume.

In determining whether a taxing law is constitutional or not it is first necessary to ascertain its operation and effect in the light of the entire act. The form of the act is not the essential thing. In construing a tax law the court will keep in view the reason of the law, and give the law a construction which will comport with the intention of the enacting power.

Thus, in the *License Tax Cases* (5 Wall., 462), it was conceded that Congress could not grant a license to traffic in liquor within the States, because such authority is vested in the States; yet the Federal law in words provided for the issuance of a license, and made it a misdemeanor to engage in the liquor business without first paying the special tax and obtaining a license. This court upheld the law upon the ground that what the statute called a license, was in effect and operation a tax, which Congress had the right to levy upon the liquor business.

Mr. Chief Justice Chase, who delivered the opinion, says (p. 471):

The power to tax is not questioned, nor the power to impose penalties for nonpayment of taxes. The granting of a license, therefore, must be regarded as nothing more than a mere form of imposing the tax, and of implying nothing except that the licensee shall be subject to no penalties under national law if he pays it.

V.

This exaction is not a direct tax upon the estate, but a duty or excise upon the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons. This right or privilege, while not created or conferred by the United States, is enjoyed under its protection and may be taxed for the support of the Government. The executor, administrator, or trustee is made subject in the first instance to the payment of the duty, with a right to reimbursement in the settlement of his accounts. It is the passage, not the possession, of property which determines the duty. While the property is the subject of the assessment, the privilege is the subject of the tax.

It is contended that this is a direct tax because, by the language of the act, it does not appear to be an excise upon the right of inheritance or privilege of succession; that under the graduated scale the rate is not determined by the amount of the legacy or distributive share, but is based upon the value of the estate after paying the debts. It is therefore urged that the tax is one upon the property in the hands of the executor or administrator, and hence direct, and being unapportioned, violates the Constitution.

It may be conceded that a careful reading of the act does not lead to the conclusion that Congress intended to tax the privilege of receiving the legacy or distributive share, and thus plant itself upon the proposition that the duty is a price exacted from the legatee or distributee for a privilege conferred. Congress could not properly do so. It confers no privilege, and therefore can exact no price. The tax can not be sustained on the theory that it is a bonus paid for something enjoyed at the hands of the General Government.

The tax is nevertheless a tax upon a privilege. The decisions (see Appendix) are conclusive upon the point that in the transmission of an estate a privilege is enjoyed. The estate does not descend by common right, but by virtue of law. In the act of devolution a privilege is involved, and this privilege may be taxed. The exaction is not a direct tax upon the estate, but an excise upon the right or privilege of transmitting it. It is a duty upon the devolution of the estate, properly made payable by the executor, administrator, or trustee through whom the estate passes.

Sections 29 and 30 are an exact copy of sections 124 and 125 of the act of 1864 (13 U. S. Stats., 285, 286), with the exception of the exemption and the graduated scale, based on the value of the estate, and excepting that the word "collector" in section 30 was "assessor" in section 125. Let us examine their provisions with a view of determining what the exaction really is.

Section 29 provides "that any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from

personal property, * * * passing * * * from any person possessed of such property, either by will or by the interstate laws of any State or Territory, * * * to any person or persons, or to any body or bodies politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows."

It is not the property which passes but the person or persons having the same in charge who, under this language, are made subject to the tax. The executor, administrator, or trustee is subjected in the first instance to a duty or tax determined by the value of the estate passing through his hands and the degree of relationship of the persons to whom it goes.

Section 30 provides "That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid" (observe, the lien is not on the property *of the legatees or distributees*), but the essential provision is that "every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector * * * the amount of the duty or tax assessed upon such legacy or distributive share." The executor, administrator, or trustee is required to make out a sworn statement or schedule of the legacies or distributive shares in his charge, giving the value thereof, the names of the persons entitled thereto, and the amount of the duty assessed thereon, which is to be "immediately delivered, and the tax thereon paid to such collector."

Upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators.

The twenty-ninth section makes the executor, administrator, or trustee subject to the tax on property which passes through his hands. The thirtieth section provides a method by which to collect the tax from him and authorizes him to reimburse himself at the hands of those who receive the property from him. He is required to furnish the collector with a statement of the legacies or shares in his charge, the duty assessable thereon, and to pay the tax to the collector, from whom he receives a receipt, which is warrant for the allowance of the payment in the settlement of his accounts in the State court.

If the executor, administrator, or trustee shall refuse to pay the duty or to deliver the sworn statement or make a false or incorrect statement, the collector shall make out the list and valuation and assess the duty.

And the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such

property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, * * * shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same.

Here is a provision for compelling the payment by the person in charge of an estate of the duty or tax, with the right to reimburse himself out of the property assessed. Suit is to be brought "against such person or persons as may have actual or constructive custody or possession of such property or personal estate." The suit is not brought against the legatees or distributees, or persons entitled to the estate. It is brought against those in charge—the executors, administrators, or trustees. The property of which the executor, administrator, or trustee has custody may be sold, the tax or duty with the costs of the suit paid out of the proceeds, and the balance held by the court "to be paid under its direction to such person or persons as shall establish title to the same."

Such are the provisions of the law.

It is not property in itself which is liable to the tax, but property "passing * * * either by will or by the intestate laws of any State or Territory;" it is not the ownership or possession of property which leads to the charge or imposition, but it is the descent or devolution of property; the burden, therefore, falls, not upon property, but upon the passage or transmission or devolution of property, and the duty is charged in the first instance upon the executor, or administrator, or trustee,

through whom the act of descent or devolution takes place.

Is such a tax, so laid and so collected, a direct tax upon property?

What a direct tax is found an elaborate discussion in the recent income tax case of *Pollock v. Farmers' Loan and Trust Co.* (157 U. S., 429; 158 U. S., 601). Before the decision of these cases, the trend of authorities limiting the meaning of a direct tax, as used in the Constitution, to a capitation tax and a tax on land. On the original submission of these cases, the court held that a tax on the rents or income of land is a tax on the land itself, and therefore a direct tax within the meaning of the Constitution. On the rehearing the court extended its definition of a direct tax so as to include a tax levied on personal property or the income thereof. Such is the extent to which the court went.

Mr. Edmunds argued against the income tax law. He gives the following definition of a direct tax (157 U. S., 491):

A direct tax is a tax upon every kind of property and upon every kind of person in respect of himself, or in respect of his property, either in existence or acquired, or to be acquired, and not in respect to his voluntary calling, pursuit, or acts, as importing goods, which he may import or not import, as he pleases, not in respect of his being a trader or manufacturer, etc., in all of which cases he is taxed as a consequence of his free choice of business, and in all of which the burden is to some degree moved on—but in respect of things that belong to the existence of property as an entity—a state of physical being.

Duties, imposts, and excises are, in large degree, and almost universally, heavy or light upon each person, depending upon his own will.

* * * * *

Mr. Justice BROWN. Is not the distinction somewhat like this: That direct taxes are paid by the taxpayer both immediately and ultimately; while indirect taxes are paid immediately by the taxpayer and ultimately by somebody else.

Mr. EDMUNDS. Yes, sir; that is a much clearer definition than I have given, though I think the whole burden rarely falls on the last man. It is, I think, borne partly by each agent in the movement.

In another place (p. 487) Mr. Edmunds speaks of indirect taxes as those "which are intended to fall upon the movement of commodities and the voluntary occupations of men."

In the opinion of the court, Mr. Chief Justice Fuller thus defines direct taxes (157 U. S., 558):

Ordinarily all taxes paid primarily by persons who can shift the burden upon some one else, or who are under no legal compulsion to pay them, are considered indirect taxes; but a tax upon property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which can not be avoided, are direct taxes.

Mr. Justice Field, in his concurring opinion, thus describes excise taxes (157 U. S., bottom p. 592):

Excises are a species of tax consisting generally of duties laid upon the manufacture, sale, or consumption of commodities within the country, or upon certain callings or occupations, often taking the form of exactions for licenses to pursue them.

In the opinion on the rehearing, in discussing the meaning of the words "duties, imposts, and excises," used in the Constitution, Mr. Chief Justice Fuller, speaking for the court, says (158 U. S., 622):

Cooley (on Taxation, p. 3) says that the word "*duty*" ordinarily "means an indirect tax imposed on the importation, exportation, or consumption of goods;" having "a broader meaning than *custom*, which is a duty imposed on imports or exports;" that "the term *impost* also signifies any tax tribute or duty, but it is seldom applied to any but the indirect taxes. An *excise* duty is an inland impost, levied upon articles of manufacture or sale, and also upon licenses to pursue certain trades or to deal in certain commodities."

In *Pacific Insurance Co. v. Soule* (7 Wall., 433), Mr. Justice Swayne, speaking for the court, adopts the following definition of an excise tax (bottom p. 445):

Excise is defined to be an inland imposition, sometimes upon the consumption of the commodity, and sometimes upon the retail sale; sometimes upon the manufacturer, and sometimes upon the vendor. (Citing Bateman's Excise Law, 96; Story's Const., sec. 953; 1 Blackstone's Com., 318.)

Congress, as an indication of the character of the tax, used in the act itself the word "duty," which, as appears by the citations I have made, ordinarily means an indirect tax or an excise. This tax comes within every definition on an indirect tax given in the quotations I have made from the Income Tax Cases.

It comes within Mr. Edmunds's definition. It is not levied on property with respect to itself or its income; it

falls upon the movement of property, upon its descent, its transmission, its devolution.

It comes within the definition of Mr. Justice Brown; it is not paid both immediately and ultimately by the taxpayer. It is paid immediately by the administrator, executor, or trustee. It is ultimately charged up against the estate, and so the burden either falls upon the legatee or distributee, or is foreseen and provided for by the testator or intestate. It is impossible to say that, under the operation of the act, the tax is paid by the legatee, for naturally the testator, in making his will, will take into consideration the tax, so the legatee will get all the testator intended to leave him after the tax is paid.

It comes within the definition of Mr. Chief Justice Fuller. It is not a tax paid primarily by a person who can not shift the burden upon some one else and who is under a legal compulsion to pay it. It is paid by the executor, who charges it against the estate and has it allowed in his settlement. But if regarded as a tax on the legatee or distributee, yet it is not a tax laid with respect to property which he owns. It is property in process of transmission to him, property which he does not have to take. If he does not want to pay the tax, he can leave the property. In fact, he never gets the whole property and pays the tax out of it. He only gets the property less the tax, so the tax is never levied upon any property he owns.

The practical operation of the statute—the real nature of the exaction—is what the court will look to in determining whether the tax is direct or not. Is it not absurd to jump to the conclusion that Congress would do

a wholly futile thing by levying an unapportioned tax upon personal property? Certainly Congress never intended to pass an act void and inoperative on its face. It was the design of Congress to pass a valid law, to lay a tax in accordance with the Constitution. This it could do by taxing the privilege of transmitting the property; it could not do so by taxing the property itself. The privilege of transmitting the property, whether by will or the intestate laws of any State or Territory, may be taxed either by the State or by the Federal Government. In either case the tax is an indirect tax—an excise—which does not have to be apportioned. The language of the court, speaking by Mr. Justice Peckham, in the case of *Nicol v. Ames* (173 U. S., 509, 515) is in point:

In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific, or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with

reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.

VI.

This excise is uniform because it operates with the same force and effect in every place where the subject of it is found. Wherever the privilege of transmitting an estate of a certain value to persons of a certain degree of consanguinity is enjoyed, the same duty is laid and collected. The classification of the privileges taxed made by the act is proper, because each class has inherent characteristics which distinguish it from the other classes and justify the tax laid, namely, the value of the property transmitted and the degree of kinship of the persons to whom it goes.

The Constitution provides that "all duties, imposts, and excises shall be uniform throughout the United States." Conceding this exaction to be in the nature of an excise, opposing counsel assail it on the ground that it lacks uniformity. They insist there is no legal basis for the exemption made and the classes created by the law; that since the legacies or shares are assessed according to their value, the same rate should obtain whatever the value; that to exempt estates of \$10,000 or less, and to levy a graduated rate upon estates above \$10,000 in value, is to violate the law of uniformity; that such a classification, based upon the value of estates, is purely arbitrary and results in unequal and unfair discriminations against the larger in favor of the smaller estates.

In defining what the Constitution requires in the way of uniformity, Mr. Justice Miller, speaking for the court, said, in the *Head Money Cases* (112 U. S., 580, 594):

The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. * * * Perfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream, as this court has said more than once. (*State Railroad Tax Cases*, 92 U. S., 575, 612.)

In the case of *Tappan v. Merchants' National Bank* (19 Wall., 490, 504), Mr. Chief Justice Waite, speaking for the court, said:

Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules can not be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purposes of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all.

In order to equalize the burdens of taxation in accordance with its views of what will promote the general welfare, Congress must have the discretion to select and classify the subjects of taxation. In this respect Congress has the same power that the legislatures of the States exercise. Over and over again this court has sustained the power of classification when assailed under the fourteenth amendment.

In *Bell's Gap Railroad Co. v. Penna.* (134 U. S., 232, 237), the court, speaking by Mr. Justice Bradley, said:

We think we are safe in saying that the fourteenth amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would * * * render nugatory those discriminations which the best interests of society require.

In *Home Insurance Company v. New York* (134 U. S., 594, 606), Mr. Justice Field, speaking for the court, said:

But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation and another kind of property to a different rate; distinguishing between franchises, licenses, and privileges and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation.

In *Pacific Express Company v. Siebert* (142 U. S., 339), Mr. Justice Lamar, in delivering the opinion, said, page 351:

This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.

It is true that to sustain a classification for purposes of taxation there must be some distinguishing characteristics in the created classes. In other words, classification can not be purely arbitrary without any basis in fact. As the court, speaking by Mr. Justice Brown, said in *Gulf, Colorado and Santa Fe Ry. v. Ellis* (165 U. S., 150, 165):

It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.

Or, as Mr. Justice Peckham, answering the objection that a classification for purposes of taxation was not uniform, put it, in *Nicol v. Ames* (173 U. S., 509, 521):

The question always is, when a classification is made, whether there is any reasonable ground for it, or whether it is only and simply arbitrary, based upon no real distinction and entirely unnatural. (*Gulf, Colorado, etc., Railway v. Ellis*, 165 U. S., 150-155; *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283, 294.) If the classification be proper and legal, then there is the requisite uniformity in that respect.

The question, then, in this case is, Is there any reasonable ground for the classification of the privileges defined and taxed by the act? The court will observe that I say privileges, not property. While the property may be the subject of the assessment, the privilege is the subject of

the tax. What the act classifies are certain privileges. Here they are.

The following six classes are based upon the degree of consanguinity:

Class.	Passing to—	Rate per \$100.
1	Husband or wife.....	Exempt.
2	Lineal issue or lineal ancestor, brother or sister.....	\$0.75
3	Descendant of a brother or sister.....	1.50
4	Brother or sister of father or mother, or descendant of brother or sister of father or mother.....	3.00
5	Brother or sister of grandfather or grandmother or descendant of brother or sister of grandfather or grandmother.....	4.00
6	Any other degree of collateral consanguinity or stranger in blood, or body politic or corporate.....	5.00

The following six classes are based on the amount of the estate, or property passing:

Class.	Amount of estate.	Rate per \$100.
1	\$10,000 and under.....	Exempt.
2	Exceeding \$10,000 to not exceeding \$25,000.	Rate fixed by consanguinity.
3	Exceeding \$25,000 to not exceeding \$100,000.	Rate multiplied by $1\frac{1}{2}$.
4	Exceeding \$100,000 to not exceeding \$500,000.	Rate multiplied by 2.
5	Exceeding \$500,000 to not exceeding \$1,000,000.	Rate multiplied by $2\frac{1}{2}$.
6	Exceeding \$1,000,000.....	Rate multiplied by 3.

I do not understand that the validity of the classification based upon the degree of consanguinity is seriously assailed. It seems to be conceded that Congress has the

power to create the six classes which I have first tabulated; the first class being exempt, the succeeding five being subject to rates varying according to the degree of kinship. The attack is made upon the classes which are set out in the second table, where the amount of the estate defines the privilege, determines whether it shall be taxed, and, if so, at what rate. It is the graduated rate or progressive tax which is strenuously assailed.

Admitting there must be a basis for classification, what is more characteristic of an estate, or the privilege of transmitting it, than its value. Every estate has value, and the right of transmitting it is esteemed, usually, simply because of its value. The objection, then, must be to the limitation of the classes defined. But the argument on the other side would prevent any definition of a class. It would prevent any exemption whatever. (See *Cope's Estate*, 191 Penna., 1.) It would require a uniform rate to be levied upon all estates, however small or however large. Of course it may be said that there is no real distinction between an estate valued at \$10,000 and one valued at \$10,001, and yet the first is exempt, while the latter is taxed. But there must be a line drawn somewhere, if you are going to classify anything. And the person or corporation or property on one side of the line will be entitled to certain privileges or subject to certain burdens, which the property or person or corporation on the other side of the line will not be, no matter how slight the difference. The sole argument is that a difference of one dollar puts an estate on one side or the other, while a difference of one dollar does not change the character of the estate.

And yet a difference of a dollar in a theft will keep a man from going to the penitentiary or send him there; a difference of a dollar in a matter involved in litigation will put a case in a certain court or keep it out; a difference of a day will enable a man to vote or prevent the exercise of that privilege. Innumerable instances of this sort might be cited, for in every direction governments have employed classification in the exercise of the power to regulate, to control, to tax; in short, to legislate.

In *Minot v. Winthrop* (162 Mass., 113), the court, discussing the objection that the Massachusetts tax on inheritance violated the rule of uniformity on account of the exemption of estates of \$10,000 and under, said, bottom page 123:

In all, or nearly all, systems of taxation there are some exemptions, but the objection here is that estates whose value, after payment of all debts, shall not exceed \$10,000 are exempt, without regard to the value of the property received by the devisees, legatees, heirs, or distributees. It is argued that the excise, if upon the privilege of taking property by will or descent, should be the same whenever the privilege enjoyed is the same, in kind and extent, whatever may be the value of the estate, and that the exemptions should relate to the value of the property received by those who have the privilege of receiving it, and not to the value of the estate. *But the right or privilege taxed can, perhaps, be regarded either as the right or privilege of the owner of property to transmit it on his death, by will or descent, to certain persons, or as the right or privilege of these persons to receive the property.* The tax, too, has some of the characteristics of

a duty on the administration of estates. The cost of administering small estates is proportionately greater than that of administering large ones, and this of itself, particularly in intestate estates, operates to diminish the amounts received very much as a tax would. The statutes of the different States and nations which have levied taxes on devises, legacies, and inheritances have usually made exemptions, and these have sometimes related to the value of the estates and sometimes to the value of the property received by the heirs, devisees, legatees, or distributees. The exemption in the statute under consideration is certainly large as an exemption of estates; but it is peculiarly within the discretion of the legislature to determine what exemptions should be made in apportioning the burdens of taxation among those who can best bear them, and we are not satisfied that this exemption is so clearly unreasonable as to require us to declare the statute void.

In the recent case of *Magoun v. Illinois Trust and Savings Bank* (170 U. S., 283), the court sustained the validity of the Illinois inheritance tax, with its graduated rate, based upon the value of the inheritance received. Respecting the right to classify and impose a progressive tax on inheritances, Mr. Justice McKenna, speaking for the court, said, page 300:

That rule [the rule of equality] does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and may be graded according to the value of that inheritance. The condition is not arbitrary, because it is determined by that

value ; it is not unequal in operation because it does not levy the same percentage on every dollar ; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts ; the right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them an element of inequality ; nevertheless they are universally imposed and their legality has never been questioned.

It may be said that this court sustained the classification in the Illinois law because it was based on the value of the inheritance received, that the right to inherit was conferred by the State, and the State could annex to that right whatever condition, in the way of a contribution to the revenues of the State, it saw fit.

Concede the United States did not confer the right to inherit ; it has not attempted to annex a condition to it ; it has not graded the tax according to the amount of property received. In transmitting an estate a privilege is enjoyed. The act of devolution takes place by virtue of law. Recognizing the existence of this privilege, Congress has taxed it. In fixing the tax the classes of privileges enjoyed have been defined with reference to the amount or value of the entire property transmitted. This is entirely proper. The right or privilege taxed under this law is, as suggested in the Massachusetts case, "the right or privilege of the owner of

property to transmit it on his death, by will or descent, to certain persons." If a State may levy a progressive tax upon the right or privilege of legatees and distributees to inherit or succeed to property, may not Congress levy a progressive tax upon the right of the owner of property to transmit it on his death to his successors? In the former case the rate would be determined, of course, by the value of the legacy; in the latter case by the value of the estate.

But it may be said that a State, in the exercise of its power to regulate inheritances, may levy a progressive tax, while Congress, having no power to regulate inheritances, can not. This is as much as to say that Congress, in using the taxing power, can not keep in mind the public welfare and so levy its taxes as to promote that. Equality and uniformity as applied to legislation are synonymous terms. The equality guaranteed by the fourteenth amendment is as broad as the uniformity enjoined upon Congress in levying an excise tax. What does not violate one is not prohibited by the other. If a State can classify the privileges enjoyed in transmitting estates and tax these privileges by a progressive rate, preserving at the same time equality, the United States may do the same thing without violating the rule of uniformity.

In point of fact, what the supreme court of Ohio said in *State ex rel. v. Ferris* (53 Ohio St., 314) about the inheritance tax before it, applies to all such acts passed in this country, so far as I have been able to observe. In answer to an argument in favor of the Ohio law that it was

not purely for the raising of revenue, but for the regulation of the succession and transfer of property, the court said, page 340:

The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances, and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. *The act is clearly one for taxation and not for regulation, as shown by its provisions and title.*

The Illinois law upheld by this court was clearly one for taxation and not for regulation. The higher rate levied on the larger estates was laid for the purpose of raising more money. The legislature properly thought that the smaller estates could not stand the rate which would prove no burden on the greater estates. The exemption was of an estate regarded as necessary for the support of the widow and children, which, in view of the cost of administering it, the legislature thought ought not to be taxed at all. All these considerations relate to taxation and may properly have induced Congress to make the classification and levy the progressive rate in the act under consideration. It is simply a question of equalizing the burdens of government—placing them where they will be least felt.

In the briefs many illustrations are given of the alleged inequality produced by applying to the small legacies the higher rates fixed by the large estates. If a rate fixed by a large estate is applied to a small legacy, and ultimately charged against the legacy, it is the

fault of the owner of the large estate. He can readily arrange matters in his will so as to relieve the smaller legacies from the burden of the tax.

CONCLUSION.

Much solicitude is expressed for the future of the Republic if the court sustains this law with its graduated scale. But the court has already sustained the progressive rate when applied by the States. Is the country therefore doomed? Will the "plain" people lose their interest in the Government if all the States do as Illinois has done, and tax the transmission of the great estates at a higher rate than the small ones? I have never heard the "plain" people complain because they are being deprived of the privilege of paying their share of the taxes. The common complaint is that they pay more than their share; that on listing day the stocks and bonds of the great estate go into hiding, while the horses and cattle and produce of the small estate can not escape the eye of the assessor. Death uncovers the great estate, discloses its investments, lays it open to taxation, gives Government a chance to even up. Perhaps that is one explanation of the higher rate on the great estate.

JOHN K. RICHARDS,

Solicitor-General.

DECEMBER 2, 1899.



APPENDIX.

FEDERAL CASES.

Mager v. Grima, 8 How., 490 (1850), Taney, C. J. Louisiana law sustained.

Bottom page 493:

"Now, the law in question is nothing more than an exercise of the power which every State and sovereignty possesses, of regulating the manner and terms upon which property, real or personal, within its dominion may be transmitted by last will and testament, or by inheritance, and of prescribing who shall and who shall not be capable of taking it."

Carpenter v. Commonwealth, 17 How., 456 (1854); Campbell, J.; Pennsylvania law sustained.

Page 462:

"But until the period of distribution arrives, the law of the decedent's domicile attaches to the property, and all other jurisdictions refer to the place of the domicile, as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property, by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of donee are subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interest of its public order, and are only irrevocably established upon its abdication of this control at the period of distribution. If

the State during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it."

Scholey v. Rew, 23 Wall., 331 (1874); Clifford, J., Federal real estate succession tax.

Page 347:

"The succession or devolution of the real estate is the subject-matter of the tax or duty, * * * nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction."

Bottom page 348:

"The subject-matter of the assessment is the devolution of the estate or the right to become beneficially entitled to the same, &c."

United States v. Fox, 94 U. S., 315 (1876); Field, J.; under New York law, devise to United States void.

Page 320:

"The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. (*McCormick v. Sullivan*, 10 Wheat., 202.)"

Clapp v. Mason, 94 U. S., 589 (1876); Hunt, J.; United States tax on successions construed.

Held: That the tax could not accrue until the successor became entitled to the possession of the estate. Since

such succession did not take effect until after the repeal of the act, the tax was wrongfully imposed.

Mason v. Sargent, 104 U. S., 689 (1881); *Matthews, J.*; United States tax on legacies construed.

Same holding with regard to the tax upon legacies, the same estate being involved.

Wallace v. Myers, 38 Fed. Rep., 184 (1889); *Wallace, J.*; New York tax on United States bonds sustained.

Page 185 :

"The statute exacts compensation in the form of a tax, and measures the price according to the value of the inheritance; and the purpose and effect of valuing the the bonds when they form a part of the decedent's estate is to ascertain and measure the value of the privilege. * * * *The bonds are the subject of the appraisal and the privilege is the subject of the tax.*"

United States v. Perkins, 163 U. S., 625 (1896); *Brown, J.*; New York tax on property bequeathed United States upheld.

Page 627 :

"While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and to the increase thereof, during his life, except so far as the State may require him to contribute his share for public expense, *the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control.*"

Page 628 :

"Certainly, if it be true that the right of testamentary disposition is purely statutory, the State has a right to require a contribution to the public treasury before the bequest shall take effect. *Thus the tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.*"

Page 629:

"That the tax is not a tax upon the property itself, *but upon its transmission by will or descent*, is also held, both in New York and in several other States" (citing cases).

Page 630:

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, *since the tax is upon the legacy before it reaches the hands of the Government*. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Magoun v. Illinois Trust and Savings Bank, 170 U. S., 283 (1898); McKenna, J.; Illinois progressive tax upheld.

Page 287:

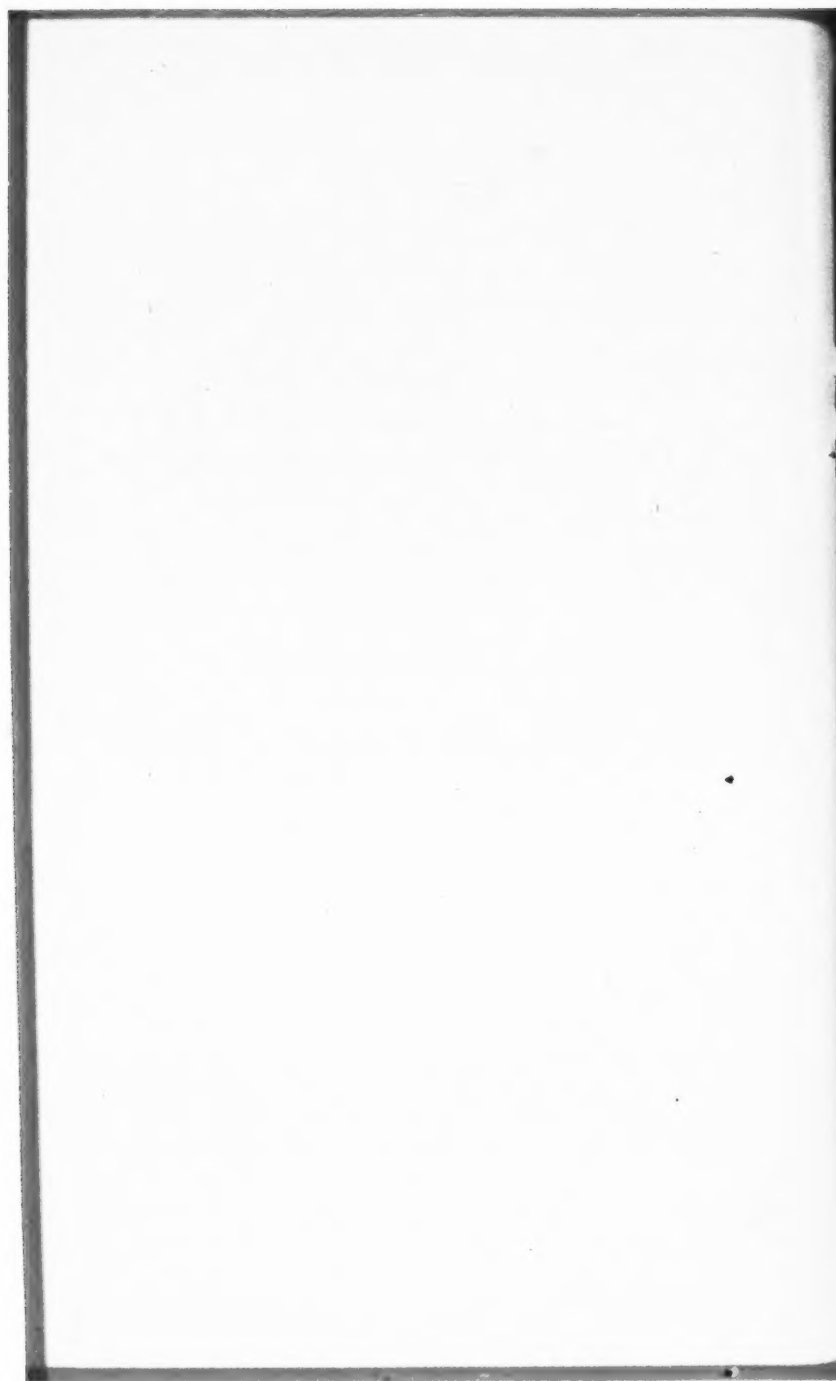
"Legacy and inheritance taxes are not new in our laws. They have existed in Pennsylvania for over sixty years, and they have been enacted in other States. They are not new in the laws of other countries. In *State v. Abston* (94 Tennessee, 674), Judge Wilkes gave a short history of them as follows: 'Such taxes were recognized by the Roman law. Gibbon's *Decline and Fall of the Roman Empire*, vol. 1, pp. 163-164. They were adopted in England in 1780, and have been much extended since that date. Dowell's *History of Taxation in England*, 148; Acts 20 George III, c. 28; 45 George III, c. 28; 16 and 17 Victoria, c. 51; *Green v. Craft*, 2 H. Bl., 30; *Hill v. Atkinson*, 2 Merivale, 45. Such taxes are now in force generally in the countries of Europe. (Review of Reviews, February, 1893.) In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and, still more recently, in Connecticut, New Jersey, Ohio, Maine, and Massachusetts, 1891; Tennessee in 1891, chapter 25 now repealed by chapter 174, acts 1893.

They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reenacted in 1863, and repealed in 1884.' Other States have also enacted them, Minnesota by constitutional provision.

"The constitutionality of the taxes has been declared and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S., 625, 628; *Strode v. Commonwealth*, 52 Penn. St., 181; *Eyre v. Jacob*, 14 Grat., 422; *Schofield v. Lynchburg*, 78 Virginia, 366; *State v. Dalrymple*, 70 Maryland, 294; *Clapp v. Mason*, 94 U. S., 589; *In re Merriam's Estate*, 141 N. Y., 479; *State v. Hamlin*, 86 Maine, 495; *State v. Abston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; *Dos Passos Collateral Inheritance Tax*, 20; *Minot v. Winthrop*, 162 Mass., 113; *Gelsthorpe v. Furnell* (Montana), 51 Pac. Rep., 267. See also *Scholey v. Rew*, 23 Wall., 331.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective State constitutions requiring uniformity and equality of taxation."





No. 2250.

Office Supreme Court U. S.
FILED

MAR 27 1900

JAMES M. McKEENEY,

Clerk.

Ad^d By of City (Richards)

on question propounded by Court

Filed Mar 7, 1900

In the Supreme Court of the United States.

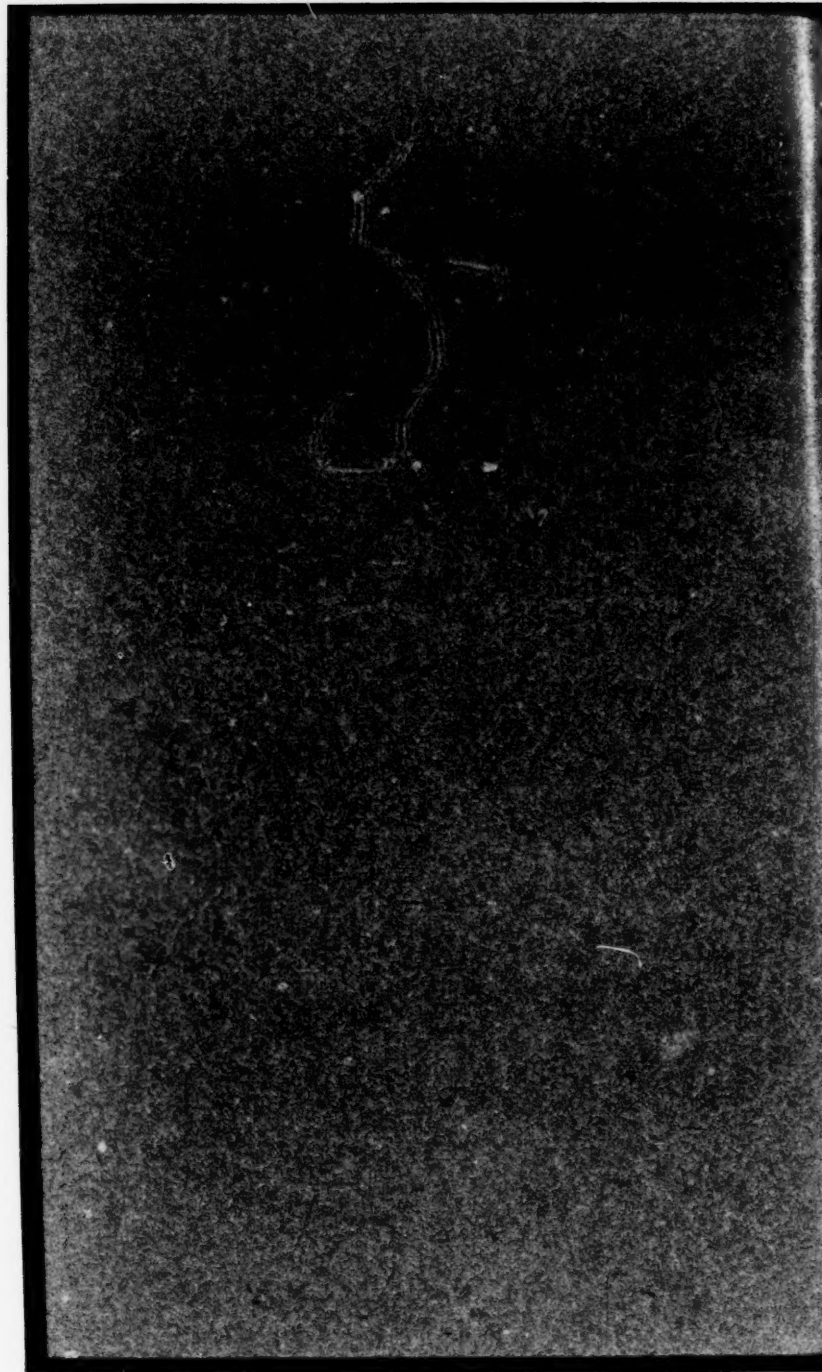
OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JAMES M.
High, appellants,

v.
F. E. COYNE, AS COLLECTOR OF
United States internal revenue for
the first district of Illinois, and
Ellen T. High, as executrix of
James L. High, deceased.

No. 225. Also
cases Nos. 387,
451, 458, and
459.

ADDITIONAL BRIEF FOR THE UNITED STATES ON
THE QUESTION SUBMITTED BY THE COURT.



In the Supreme Court of the United States.

OCTOBER TERM, 1899.

SHIRLEY T. HIGH AND JESSIE M. High, appellants, v. F. E. COYNE, AS COLLECTOR OF United States internal revenue for the first district of Illinois, and Ellen T. High, as executrix of James L. High, deceased.	}	No. 225. Also cases Nos. 387, 451, 458, and 459.
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ADDITIONAL BRIEF FOR THE UNITED STATES ON THE QUESTION SUBMITTED BY THE COURT.

I.

The question which the court desires discussed is,
"Whether the tax or duty imposed on each of the legacies is measured by the volume of the estate or by the amount of the legacy."

Under the ruling of the Commissioner of Internal Revenue (promulgated without taking the advice of the

Attorney-General), the tax or duty is measured by the volume of the estate. The rates in the cases before the court were so fixed and the duties ascertained. Naturally, in my oral argument and in the briefs I have heretofore filed, I assumed that this construction was correct, and endeavored to show that the duty thus measured is a valid excise, uniform throughout the United States.

In the original briefs opposing counsel for the most part took the same view of the law, but there were some who suggested that the law might be construed so as to measure the duty by the amount of the legacy, and they discussed its validity in the light of that interpretation. Now all are united in strenuously insisting that the duty is measured by the volume of the estate. The reason is apparent. They infer from the order of the court that the validity of the law, as viewed by the court, depends upon whether the duty is measured by the volume of the estate or by the amount of the legacy. They think if the first view is taken the law will fall, if the second the law will stand, and so they are naturally strong in the opinion that the first view is the only possible one. I can add nothing to the elaborate arguments they submit in favor of the construction which they think will inevitably invalidate the law. It occurs to me, however, that if they are right in their inference as to the present status of the question of the constitutionality of this measure, it may be well for me to present to the court, by way of suggestion, certain considerations in support of the construction that the duty is measured by the amount of the legacy. If the mode of measuring the

duty *is* vital (which I do not believe), and if the act can reasonably be construed so as to sustain instead of defeat it, the court will so construe it.

II.

The graduated rate was added to the bill in the Senate, Mr. Wolcott having charge of the amendment. Counsel have printed in their briefs extracts from the discussion in the Senate on May 20, 1898. It appears from these extracts that Mr. Lodge pointed out what he regarded as the unfairness of grading the tax according to the volume of the estate instead of the amount of the legacy. Mr. Chandler inquired whether the limitation as to the amount applied to the estate or to the legacy and was assured by Mr. Wolcott that it applied to the estate, and that where the estate exceeds in value \$10,000 every legacy would have to pay, however small or large. No doubt Mr. Wolcott spoke in good faith, but he was not authorized to speak for Congress. The amendment introducing the graduated rate was adopted by the Senate and afterwards concurred in by the House, and the bill became a law. Now, what Congress intended in enacting this law can properly be determined only by the language of the law itself. A member who votes intelligently for a measure votes because of what *he* believes the language means, not because of what some other member says it means. Members disagree as to the construction of a measure and yet unite in voting for it, each believing that the courts will sustain his view of it. So, after all, the question of construction is one for the court, to be determined from the language used.

In the recent case of *Maxwell v. Dow*, decided February 26, 1900, Mr. Justice Peckham, speaking for the court, said :

What individual Senators or Representatives may have urged in debate in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. (*United States v. Trans-Missouri Freight Association*, 166 U. S., 290, 318 ; *Dunlap v. United States*, 173 U. S., 65, 75.)

III.

In Great Britain and in many of the British possessions, as the court will see by a reference to the appendix printed in my brief in reply to that of Evarts, Choate & Beaman, the estate duty is kept separate from the legacy tax. Each is graded, the duty on estates according to the volume of the estate, and that on legacies according to the amount of each legacy. The estate duty is applied usually to the clear value of the entire estate, real and personal. But this is not always done. In Canada the value of the estate, as well as the amount of the individual legacy, is used in determining whether the succession tax shall be levied in any particular case and the rate and amount when levied. I refer particularly to the succession duties in Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and British Columbia.

IV.

The act of June 30, 1864, contained in the beginning of section 124 a limitation, as follows : "Where the whole

amount of such personal property, as aforesaid, shall exceed the sum of one thousand dollars in actual value." This limitation in the enforcement of the law was held to apply to the total value of the legacies or distributive shares; in other words, to the volume of the estate. These words of limitation are retained in the present law, the amount being changed from \$1,000 to \$10,000. The retention of the clause was, however, unnecessary after the insertion of the provisions for the graduated rate. If it conflicts with the new matter providing for the graduated rate, the court may reject it. At any rate, it is surplusage, for the provisions for the graduated rate cover the whole matter, whether such rate is based upon the volume of the estate or the amount of the legacy.

In support of the construction that the rate is measured by the amount of the legacy, I direct the court's attention to the fact that *section 29, read as a whole, provides the method for determining a single duty or tax, namely, the duty or tax upon one legacy, share or transfer.* The person or persons having in charge or trust any legacies or shares arising from personal property, passing either by will or by the intestate laws, or any personal property or interest therein, transferred by deed or gift to take effect after the death of the grantor, are made subject "to a duty or tax, to be paid to the United States, as follows," and then follows the method for ascertaining the duty or tax, which I shall take up a little later. I stop here to note that counsel who attack the law all ignore or reject the provision, "or personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect, in

possession or enjoyment, after the death of the grantor or bargainor." Yet this clause is inserted in the body of the first paragraph, constitutes a part of it, and must be construed along with the rest of it. It is not only the person or persons in charge of legacies or distributive shares passing by will or the law of intestacy, but also the person or persons in charge of any personal property or interest therein transferred by deed or gift intended to take effect after death, who are made subject to the duty or tax. The subsequent limitations and provisions regulating the ascertainment of the duty or tax therefore apply as well to property transferred by deed to take effect after death as to property transmitted by will or intestate laws.

After providing that any person or persons in charge of any legacies or shares passing by will or by intestate laws, or any personal property or interest therein transferred by deed to take effect after death, to any person or persons, shall be made subject to "a duty or tax to be paid to the United States, as follows," the section proceeds:

Where the whole amount of said personal property shall exceed in value ten thousand dollars and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property, etc.

This is *one* provision, to be read together. It lays down the rule for ascertaining the duty or tax in a particular case which is defined by the amount of the personal property transferred and the degree of kinship of the beneficiary. Where the whole amount of said personal property shall exceed in value \$10,000 and shall not exceed in value the sum of \$25,000, and where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, the tax shall be at the rate of 75 cents for each and every \$100 of the clear value of such interest in such property. This can be read as a provision relating in each instance to the amount of the legacy and the kinship of the recipient.

It is said that if Congress had intended the limitation in amount to apply to the legacy or share, it would have said so, making the act read: "Where the amount of the legacy or distributive share shall exceed in value," etc. But this loses sight of the fact that the act also applies to "personal property or any interest therein" transferred by deed or gift to take effect after the death of the grantor or bargainer. The words "personal property" cover a "legacy" or "distributive share" or any "personal property or interest therein," but the words "legacy or distributive share" would not cover "personal property or any interest therein."

Again, it is said that the phrase "any beneficial interest in such property" is used to indicate the legacy as distinguished from the estate out of which it is payable, "beneficial interest" meaning the legacy, while "such

property" means the estate. The distinction thus sought to be drawn does not appeal strongly to me. A man who conveys property usually only conveys his right and title to and interest in the property. A beneficial interest in property may denote the entire ownership of the property or a partial ownership. "A legacy or distributive share arising from personal property" is personal property. "Any personal property or interest therein" is personal property. "A beneficial interest in personal property" is personal property. So that the words "the amount of said personal property" may as well be held to denote the legacy as the words "any beneficial interest in such property."

The succeeding clauses of section 29, numbered "second," "third," "fourth," and "fifth," furnish the rule for ascertaining the tax where the beneficiary stands in a remoter degree of kinship, the last clause (fifth) containing the exemption from tax or duty of "legacies or property passing by will, or by the laws of any State or Territory, to husband or wife." Then follows the further provision for the graduated rate:

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thou-

sand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

It is to be observed that the word "whole" is here omitted before the word "amount." "Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half," etc. What is the "said property?" Evidently the "personal property" referred to in the primary provision for ascertaining the initial rate under the graduated scale, which is that "where the whole amount of said personal property shall exceed in value ten thousand dollars, and shall not exceed in value the sum of twenty-five thousand dollars," and the beneficiary shall stand in a certain degree of kinship to the decedent, the tax shall be at a certain rate. In other words, the initial rate is determined by the amount of the personal property which passes or is transferred, not by the volume of the estate left, combined with the degree of kinship of the person to whom it passes or is transferred, that is, the person entitled to a beneficial interest in it, and the subsequent rates are computed upon that, according to "the amount or value of said property;" that is, the property which passes to a particular person holding a certain relationship to the one who died possessed of the property.

V.

That the provisions of section 29 are directed toward ascertaining the amount of a single tax or duty assessed upon one legacy or distributive share passing to a person having a certain relationship to the one who died possessed of the property is supported by the opening provisions of section 30. This section provides "*that the tax or duty aforesaid*" shall be a lien and charge upon the property of the testator or decedent, and that every executor, etc., before distribution, shall pay to the collector "*the amount of the duty or tax assessed upon such legacy or distributive share,*" and shall also deliver to the collector a schedule "*of the amount of such legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon.*"

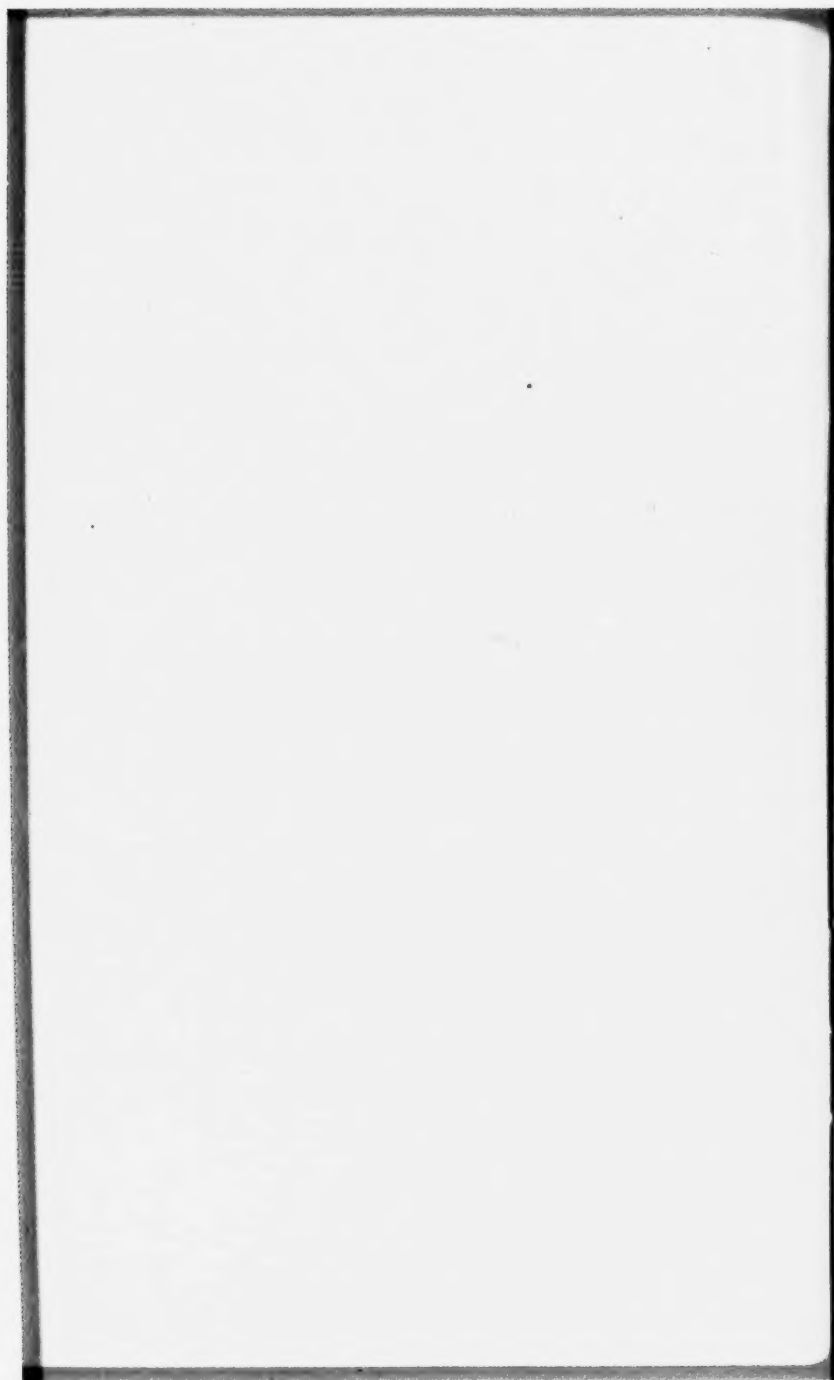
Further confirmation of this view is found in the opening provisions of section 125 of the act of 1864, as amended by the act of 1866, which are:

That the tax or duty aforesaid shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof or to the beneficial interest in the profits accruing therefrom, and the same shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States. And every administrator, executor, or trustee having in charge or trust any legacy or distributive share as aforesaid shall give notice thereof in writing to the assessor
* * * within thirty days after he shall have

taken charge of such trust; and every executor, administrator, or trustee, before payment and distribution, * * * shall pay to the collector * * * the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the assessor * * * a schedule * * * of the amount of such legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon.

JOHN K. RICHARDS,
Solicitor-General.

MARCH 15, 1900.



APPENDIX.

Sections 124 and 125 of the act of June 30, 1864 (13 Stat., 285), as amended by the act of July 13, 1866 (14 Stat., 140), as reenacted, with the addition of the graduated rate by sections 29 and 30 of the act of June 13, 1898 (30 Stat., 464).

The portions of the act of 1864, as amended in 1866, omitted in the act of 1898, are inclosed in brackets. The amendments made in 1866 to the act of 1864 are indicated by italics, while the amendments and additions made in the recent act of 1898 are indicated by black type.

SEC. 29 [124]. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property, as aforesaid, shall exceed the sum of ten [one] thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United

States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of **seventy-five cents** [one dollar] for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be a descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of **one dollar and fifty cents** [two dollars] for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed, as aforesaid, at the rate of **three** [four] dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be a brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed, as aforesaid, at the rate of **four** [five] dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other

degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five [six] dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed, as aforesaid, shall be exempt from tax or duty: *[Provided further, That any legacy or share of personal property passing as aforesaid to a minor child of the person who died possessed as aforesaid shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of one thousand dollars, in which case the excess only above that sum shall be liable to such taxation.]*

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

SEC. 30 [125]. That the tax or duty aforesaid *[shall be due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment*

thereof, or to the beneficial interest in the profits accruing therefrom, and the same] shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; [*and every administrator, executor, or trustee, having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof in writing to the assessor or assistant assessor of the district where the deceased grantor or bargainer last resided, within thirty days after he shall have taken charge of such trust;*] and every executor, administrator, or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the **said collector** [assessor] or **deputy collector** [assistant assessor of the said district] a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax thereon paid to such collector;

and upon such payment and delivery of such schedule, list, or statement, said collector or deputy collector shall grant to such person, paying such duty or tax, a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee, shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector [assessor] or deputy collector [assistant assessor] a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector [assistant assessor] shall make out such lists and valuation as in other cases of neglect or refusal,

and shall assess the duty thereon; [and in case of wilful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit. Any tax paid under the provisions of sections one hundred and twenty-four and one hundred and twenty-five shall be deducted from the particular legacy or distributive share on account of which the same is charged:] and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge, or custody,

any record, file, or paper containing, or supposed to contain, any information concerning such property or personal estate, as aforesaid, passing from any person who may die, as aforesaid, shall exhibit the same at the request of the collector [assessor] or deputy collector [assistant assessor] of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge, or custody any such records, files, or papers, shall refuse or neglect to exhibit the same on request, as aforesaid, he shall forfeit and pay the sum of five hundred dollars: Provided, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be prima facie evidence of its truth, and that the requirements of the law had been complied with by the officers of the Government.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

EBEN J. KNOWLTON ET AL., EXECUTORS, plaintiffs in error, <i>v.</i> FRANK R. MOORE, UNITED STATES Collector of Internal Revenue.	}	No. 387.

GEORGE T. MURDOCK, AS EXECUTOR OF Jane H. Sherman, deceased, plaintiff in error, <i>v.</i> JOHN G. WARD, UNITED STATES COL- lector of Internal Revenue.	}	No. 458.

GEORGE D. SHERMAN, PLAINTIFF IN error, <i>v.</i> THE UNITED STATES.	}	No. 459.

ADDITIONAL BRIEF FOR THE UNITED STATES COLLECTORS.

I.

The rule in *McCulloch v. Maryland* is invoked against this tax. That rule went no farther than to exempt a government agent while employed in government work.

Government itself can not be taxed, the Federal by the State or the State by the Federal, nor can the agency or instrumentality of the one, while employed to carry its powers into operation, be taxed by the other. Now, because an instrumentality of government is a creature of government, it is insisted that all creatures of government are exempt. The fallacy of this argument is apparent. To be exempt, the creature of government must be its agency, employed in its work.

The exemption only applies to the means, agencies, and instrumentalities employed by government in the execution of its functions. In no case has it been held to extend to rights and privileges of a private nature, although conferred by the State or enjoyed under its protection. In disposing of his property after death, either by will or by descent, a citizen is not an instrumentality of the State, nor is he engaged in the work of the State. He has the protection of the State, he is employing the means provided by law to transfer his property to his successors, but he is not exercising a function of government. His action is personal; his ends private. This applies to those who take as well as those who give. I print in the appendix some cases in point, with extracts.

II.

It is said the United States can not tax the right or privilege of inheritance because it is created by the State by virtue of its "reserved powers," with the exercise of which the Federal Government can not interfere. The Constitution provides, in the tenth amendment, that "The

powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." In other words, the "reserved powers" of the State include all powers granted the State by its constitution which the Federal Constitution did not delegate to the United States nor prohibit to the States. The entire legislative, executive, and judicial powers of the State government as commonly exercised come within this definition. I concede the United State can not tax these powers or their exercise, or the means employed to execute them, but here the exemption stops. If every right or privilege created or regulated by the State under its "reserved powers" is exempt, then no right or privilege can be taxed by the General Government which it does not itself create or confer. Substantially every right and privilege enjoyed within a State under the protection of its laws would be exempt. If this contention is right, the entire system of internal revenue is wrong, for the United States has no power to go into the States for revenue except through the door of direct taxation, which practically is closed. I submit, this argument forgets that the Government of the United States is a government of the people, which operates within the States and throughout all of them, and is the supreme authority. It forgets that the citizens of the States are also citizens of the United States. It forgets that the rights and privileges conferred by the States are enjoyed under the protection of the United States. In the acquisition, management, and disposition of large estates,

usually invested in properties of an interstate character, the protection of the courts and officers of the United States is continually asked for, and as constantly furnished. Perhaps this is one reason why the privilege of transmitting the great estates is taxed at a higher rate.

III.

Because the United States can not regulate the privilege of inheritance, it is insisted it can not tax it. But the power to tax does not depend on the power to regulate. It is complete in itself. Nay, more, it carries with it the power to regulate as a means to tax. A government which may tax, may regulate to tax. And it does not matter if the tax and the regulations adopted to lay and collect it put an additional burden or restriction on the privilege conferred by the State under its power to regulate. Under the "reserved powers" the so-called "police power" is vested in the States. The regulation of innumerable occupations and privileges is thus granted to the States exclusively. Under this power the States regulate the liquor traffic, granting for a sum a license or privilege to engage in it, but this does not exempt the traffic from additional restriction by the United States under its power to tax. So the States grant franchises and privileges, not only to individuals to become incorporated, but to corporations to do business—in other words, enjoy their franchises in the States—and for this privilege exacts a price purely arbitrary. Because the State has exclusive power to deny or confer, exclude or admit, is the franchise or privilege when conferred exempt from Federal taxation?

Not at all. In Ohio insurance companies pay a franchise tax for the privilege of doing business in the State. They pay a second tax to the United States for the privilege of doing the same business. Many other illustrations might be given.

IV.

The tax is not a direct tax because it *is* an excise tax. The Constitution puts direct taxes in one class, and duties, imposts, and excises in another. If an exaction be either a duty, impost, or excise, it is not a direct tax, whatever the incidence of the imposition may be. The tax falls not on property, but upon its movement. It is not the possession but the passage of property determines the tax. The duty is therefore on the privilege involved in the movement or passage of the property, and not upon the property itself. All the decisions, State and Federal, are to this effect. The privilege may be looked at from two points of view—from the start or the finish, the beginning or the end of the movement. From the first, it is a privilege to dispose of property, by will or descent; from the second, the privilege to take or receive property so passing. The entire movement is the devolution of the estate, and the duty may be and frequently has been termed, comprehensively, a duty on such devolution. These things are sufficient in themselves to make this an excise.

To come under the definition of a direct tax in the income-tax cases, this must be shown to be either a tax on property or its income. It is neither. It is a tax on a

privilege, not on property. It has been so upheld in the States. It could not be upheld as a tax on property, for the result would be double taxation. The usual constitutional provision in the States is that property must be taxed by a uniform rule and according to its true value in money. There is an annual tax and an annual listing day. All property in the State on that day is listed and put on the duplicate. If after listing day the owner dies the tax is paid by the executor or administrator. If the estate is not distributed before the next listing day, the executor or administrator must return it for assessment and taxation. Thus every year the property, as property, pays its tax. An additional tax on the property, as property, would obviously violate the rule of uniformity. So inheritance taxes have been sustained and can only be sustained as privilege taxes, and privilege taxes are excise taxes.

It is insisted the tax is direct, because it is paid by the legatee and can not be shifted. If paid primarily and ultimately by the legatee, there would be force in the contention. But it is not paid primarily by the legatee. It is paid by the executor. But it is said the executor simply acts as an agent in paying the tax. Whose agent? The agent of the legatee? Not so. He acts as the agent of the decedent. He holds the estate as the representative of the decedent. In other words, he acts as the agent of the estate in course of administration. The tax is made a lien upon the whole estate. If the testator does not provide for its payment, the tax is deducted from the legacy when paid. If this is to be regarded as ultimate payment by the legatee (a view I can not concede as correct),

then the tax is shifted from the estate to the legacy—from the executor in charge of the whole to the legatee who receives a part.

V.

Conceding for the sake of the argument that this is an excise, it is contended it is not uniform "throughout the United States," because it only applies where property passes "either by will or by the intestate laws of any State or Territory," and therefore does not apply within the District of Columbia.

The act of June 30, 1864 (13 Stats., chap. 173, pp. 223 to 306), contains 182 sections and provides a complete system of internal revenue to support the Government, to pay interest on the public debt, and for other purposes. Sections 124 and 125 provide for a duty upon legacies and distributive shares of personal property in the precise language of the law before the court, with the exception of a change in the exemption and the addition of the progressive rate. The last section (182) of the act of June 30, 1864, provides:

That wherever the word "State" is used in this act, it shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act.

This act, as subsequently amended, was carried into the Revised Statutes and became Title 35 (secs. 3140 to 3465), regulating the collection of internal revenue and including a provision for the collection of the taxes provided on legacies and successions (chap. 10, secs. 3438

to 3440). The first section of this title (sec. 3140) contains the provision of the last section (sec. 182) of the act of June 30, 1864, and requires that the word "State," when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out the provisions of this act.

Congress, in enacting the war revenue act of June 13, 1898 (30 Stats., 448), and in providing additional internal-revenue taxes, very properly added the provision in the closing section of the taxing portion of the act (sec. 31):

That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act.

The effect of this was to apply to the act under consideration all the administrative, special, or stamp provisions of law included in Title 35 of the Revised Statutes regulating the collection of internal revenue. In other words, it virtually incorporated the existing law respecting legacies and distributive shares of personal property in Title 35, and hence made it subject to section 3140, defining and extending the word "States" so as to include the District of Columbia.

VI.

It is urged, with great insistence, that if the tax is an excise it is not uniform, because it does not tax all estates passing by will or descent at the same rate, but exempts some and taxes others unequally, making the

larger pay a higher rate than the smaller. The effect of this is to concede the tax is an excise and yet insist it be treated as a tax upon property. It is an attempt to apply to an excise the rule of property taxation, namely, that property must be taxed by a uniform rule and according to its true value in money.

The constitutional requirement is that "duties, imposts, and excises shall be uniform throughout the United States;" that is, shall have the same operation throughout the United States; that the imposition shall be the same in all parts of the country, not one thing in Massachusetts and another in South Carolina. The cases cited by the other side (*Loughborough v. Blake* and the *Head Money cases*), as well as many others, hold clearly that the uniformity required is geographical or territorial only. The tax is uniform when it operates with the same force and effect in every place where the subject of it is found.

But it is said that the principle of uniformity underlies all taxation, and that to comply with this fundamental rule there must be uniformity and equality among the taxpayers. This is so, but how does it help the other side? The uniformity or equality which underlies all taxation is that uniformity and equality which, under the Fourteenth Amendment, must underlie all legislation. This is uniformity or equality within the created classes. All persons similarly situated must be treated alike. To all is guaranteed the equal protection of the laws.

Under the power to regulate, there must be no arbitrary deprivation of life, liberty, or property, but equal protection to all under like circumstances in the enjoyment of their rights. Under the power to tax, property

may be classified for taxation at different rates, and legislation may be special either in the extent to which it operates or the object sought to be obtained. "It is enough that there is no discrimination in favor of one against another of the same class." (*Giozza v. Tiernan*, 148 U. S., 657, 662.)

Of course, where Congress acts solely under the taxing power, it must tax for revenue only, to raise money for a public purpose; it can not tax simply to regulate, to confiscate, to destroy. So limited, the power of Congress in laying duties, imposts and excises, is ample and absolute.

In selecting subjects for a duty, impost, or excise, Congress may use value as a basis for classification, but it does not follow that because value is so used the same rate must be levied whatever the value. Value may be used to classify and different rates may be levied upon classes thus formed. This is done in levying duties, imposts, and excises. Thus, for illustration, in Schedule K, "wool and manufactures of wool," of the tariff act of August 27, 1894, is the following paragraph:

280. On woolen and worsted yarns made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca, or other animals, valued at not more than forty cents per pound, thirty per centum ad valorem; valued at more than forty cents per pound, forty per centum ad valorem.

This method has been followed time out of mind. Thus, in the act of August 5, 1861 (12 Stat., 293), there occurs this provision:

On all silks valued at not over one dollar per square yard, thirty per centum ad valorem; on all

silks valued over one dollar per square yard, forty per centum ad valorem; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard, or under, thirty per centum ad valorem; valued at over three dollars per square yard, forty per centum ad valorem.

In the levying of a duty or excise it does not follow because the property or privilege has value that the tax must be levied ratably according to the value of the property or privilege. If this tax be a property tax, it is clearly invalid. There is no need to inquire further. But if it be an excise, let it be tested by the rule of uniformity which applies to excise taxes. All excises in a sense are arbitrary. (*California v. Pacific Ry. Co.*, 127 U. S., 1, 41; *Home Insurance Co. v. New York*, 134 U. S., 599.) They rest within the discretion of the taxing power. The tax may be levied in lump or measured as the legislature prescribes. All franchises, privileges, and occupation taxes are of this sort. Thus in Ohio foreign insurance companies are taxed at two and one-half per cent on their gross receipts in Ohio for the privilege of doing business in the State. Express companies are taxed at two per cent on their receipts from Ohio business. Freight and equipment companies at one per cent on the proportion of their capital stock representing rolling stock used in the State. Sleeping-car companies, one per cent on the proportion of their capital stock representing cars used in the State. Railroads, street railroads, gas, electric-light, water, and pipe-line companies, one-half of one per cent on their gross receipts. The tax

in all these cases is essentially arbitrary. The legislature exacts whatever amount it deems just and expedient.

The tax being upon a privilege involved in the devolution of an estate, Congress properly classified the privileges, exempting those it thought ought not be made to pay, and classifying the others according to its view of their value and their ability to pay the excise imposed. If Congress had seen fit, it might have levied a specific sum on estates of a designated value, a certain amount on estates exceeding \$10,000 and not exceeding \$25,000, a larger sum on estates exceeding \$25,000 and not exceeding \$50,000, and so on. It chose not to levy a specific sum, but to grade the rate. There is no lack of authority among the great writers on political economy and the science of government in favor of such a progressive rate. One of the greatest of all, John Stuart Mill, who was not an advocate of socialism, says it seems to him "the principle of graduation (as it is called)—that is, of levying a larger percentage upon a larger sum would be both just and expedient as applied to legacy and inheritance duties." (*Principles of Political Economy*, book 5, chapter 2, section 3.)

Is it possible that Congress is without power to adjust and equalize taxation, placing the burdens where they will fall the lightest? I do not believe this court will say so. In the *Income Tax* cases Mr. Justice Brown said (158 U. S., 694): "If men who have an income or property beyond their pressing needs are not the ones to pay taxes, it is difficult to say who are." And Mr. Justice Jackson said (p. 705): "In the imposition of taxes

for the benefit of the Government, the burden thereof should be imposed upon those having the most *ability* to bear them." The burden should be adjusted to the relative strength of those who must bear it. As when two boys of unequal size carry water to the district school, the bucket is placed not in the middle of the stick, but nearer the big boy.

VII.

In Nos. 458 and 459, the *Murdock* and *Sherman* cases, it is stated that a large portion of the estate transmitted was invested in United States bonds, and the claim is made that this portion must be held exempt from taxation. No case is cited in support of the contention, but the argument is made that to exact the duty amounts to a dishonorable attempt on the part of the Government to escape the full payment of its lawful obligation, and to the extent of the tax there is a virtual repudiation of the promise to pay under the bonds.

This is not a tax upon property; but if it were, I fail to see why the United States might not tax property invested in its own bonds. States tax their own bonds along with other property unless they specially exempt them. It is a question of public policy. If the State makes no exemption, the creditor who buys the bonds is not deceived. (*Murray v. Charleston*, 96 U. S., 432, 446, 447; *People v. Home Ins. Co.*, 29 Cal., 533.) If he lives in the State or municipality, he pays less for them if they are taxable than he would if they were exempt. The Government of the United States has never agreed, so far as I know, not to tax property invested in its own

bonds. It has expressly prohibited the taxation of its bonds by any State or municipality or local authority. But this exemption would have followed from the decision of this court. The United States can not tax the bonds or agencies of a State, and neither can the State or its agencies tax the bonds of the United States. Yet, notwithstanding this constitutional and statutory prohibition, the States have invariably computed inheritance taxes upon the portion of estates invested in United States bonds. They have done this because an inheritance tax is not one upon property but upon a privilege, and the property is simply used as a measure of the value of the privilege taxed. A reference to a few cases makes this clear.

In *Strode v. Com.* (52 Pa., 181), decided in 1866, the validity of an inheritance tax levied upon United States bonds belonging to an estate which passed subject to the tax was sustained, the court holding that, the tax not being upon the property of an estate, but upon the right of succession to an estate, it mattered not if the property was partly composed of nontaxable securities.

In *Wallace v. Myers* (38 Fed. Rep., 184) it was held that, as the New York collateral inheritance tax of 1887 was not imposed on property but upon the privilege of inheritance, it mattered not if a portion of the estate was in United States bonds. The court, speaking by Wallace, judge, said (middle page, 185):

The bonds are the subject of the appraisal, but the privilege is the subject of the tax.

In the *Matter of Knoedler*, 140 N. Y., 377 (decided in December, 1893), it was held that the collateral inheritance tax applied to money collected on life-insurance

policies, payable to the estate of the decedent. It was contended on behalf of the exemption of money collected on life-insurance policies from this tax, that it is only property which is liable to taxation under the general tax laws of the State which can be taxed under the act relating to taxable transfers, and that, inasmuch as life-insurance policies can not be included in the valuation of a taxpayer's property under the general law, they can not be considered in assessing a tax under the collateral inheritance law. Upon this point the court, by Maynard, judge, says (bottom p. 380):

The main premise upon which this proposition rests is manifestly inadmissible. The taxable transfer law has no reference or relation to the general law. The two acts are not *in pari materia*. While the object of both is to raise revenue for the support of the Government, they have nothing else in common. Nearly sixty years intervened between the passage of the earlier and the later statute, and the latter was enacted under different conditions from the former. It proceeds upon a new theory of the right of the Government to tax, and establishes a new system of taxation. It taxes the right of succession to property, and measures the tax in the method specifically prescribed. All property having an appraisable value must be considered, whether it is such as might be taxed under the general law or not. Many kinds of property might be enumerated which are not assessable under the general law, but which are appraisable under the collateral inheritance tax.

In the case of the *United States v. Perkins* (163 U. S., 625), decided in 1896, a New York inheritance tax computed on property bequeathed to the United States was

upheld, notwithstanding the fact that the property of the United States is not taxable by a State. Mr. Justice Brown, speaking for the court, said (p. 628):

The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee.

Page 629:

That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held, both in New York and in several other States.

Page 630:

We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it.

See Dos Passos on Inheritance Tax Law (2d edition), section 27, page 59, and cases there cited.

VIII.

On pages 36 and 37 of Mr. Patterson's brief in Nos. 458 and 459 a ruling of the Treasury Department made December 23, 1898, is printed to show that the whole amount of personal property, before deducting debts or expenses, determines the rate of taxation. This construction was erroneous and was corrected by ruling No.

20587, which holds that "The whole amount of personal property left for distribution, after payment of the legal debts and expenses, determines the rate of tax imposed on legacies and distributive shares, without regard to the amount or value of each legacy or share."

JOHN K. RICHARDS,
Solicitor-General.

DECEMBER 13, 1899.

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APPENDIX.

INSTRUMENTALITIES OF GOVERNMENT.

In *McCulloch v. Maryland* (4 Wheaton, 316) it was held that the State of Maryland could not tax a branch of a bank of the United States. While the court held that the State could not tax a bank as an agency of the Government, it might tax the real property of the bank or the interests which citizens of the State might hold in the bank. The inhibited tax was one on the operations of the bank, consequently one on the operation of an instrument employed by the Government of the Union to carry its powers into execution.

Page 432:

"If the States may tax one instrument, employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the Government, to an excess which would defeat all the ends of Government. This was not intended by the American people. They did not design to make their Government dependent on the States."

In *Weston v. Charleston* (2 Peters, 449), this court, speaking by Mr. Chief Justice Marshall, held that a

State could not tax stock issued for loans made to the United States. The Constitution having conferred upon Congress the power to borrow money, the court held that this power could not be abridged by the States through taxing the stock or bonds which evidenced the loan.

National Bank v. Commonwealth (9 Wall., 353). Kentucky case on shares of national bank upheld. Miller, J. (p. 362), defining limitation on rule in *McCulloch* case:

"The agencies of the Federal Government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that Government."

The converse is true.

"They (the banks) are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law."

The converse is true with respect to estates in the acquisition and control of property; one is protected by the United States as well as the State law.

Veazie Bank v. Fenno (8 Wall., 533). Ten per cent tax on notes of State banks sustained. Chase, Chief Justice, after saying "the tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties," says (p. 547):

"It may be admitted that the *reserved rights* of the States, such as the right to pass laws, to give

effect to laws through Executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects for the taxing power of Congress. But it can not be admitted that franchises granted by a State are necessarily exempt from taxation; for franchises are property, often very valuable and productive property; and when not conferred for the purpose of giving effect to some *reserved power* of a State, seem to be as properly objects of taxation as any other property."

The "reserved powers" referred to near the close of this extract is one of "the reserved rights" spoken of above. A franchise conferred for a governmental purpose may be exempt while performing governmental work.

In *Collector v. Day* (11 Wall., 113) it was held that the Federal income tax could not be lawfully imposed upon the salary of a judicial officer of a State. Before this time, in *Dobbins v. Comm'rs of Erie County* (16 Peters, 435), it was decided that it was not competent for the legislature of a State to levy a tax upon the salary or emoluments of an officer of the United States. This was on the ground that the officer was a means or instrumentality employed for carrying into effect some of the legitimate powers of the Government. The same rule was applied in the *Dobbins* case.

Nelson, J. (p. 127):

"And if the means and instrumentalities employed by that Government to carry into operation the powers granted to it are, necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation?"

Bradley, J., dissenting (p. 129):

"Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? If a State incorporates a railroad to carry out its purposes of internal improvement, or a bank to aid its financial arrangements, reserving, perhaps, a percentage on the stock or profits, for the supply of its own treasury, will the bonds or stock of such an institution be free from Federal taxation? How can we now tell what the effect of this decision will be? I can not but regard it as founded on a fallacy, and that it will lead to mischievous consequences. I am as much opposed as anyone can be to any interference by the General Government with the just powers of the State governments. But no concession of any of the just powers of the General Government can easily be recalled. I, therefore, consider it my duty to at least record my dissent when such concession appears to be made."

In *United States v. Railroad Company* (17 Wall., 322), it was held that the Federal tax on the interest of the bonds of a railroad company (the Baltimore and Ohio), which the company collected from its creditors, could not be imposed with respect to bonds held by the city of Baltimore, because to sustain such a tax would be to tax a municipality which is an agency or instrumentality of the State.

Hunt, J. (page 327):

"The right of the States to administer their own affairs through their legislative, executive, and judicial departments, in their own manner through their own agencies, is conceded by the uniform decisions of this court and by the practice of the Federal Government from its organization. This carries with it

an exemption of those agencies and instruments, from the taxing power of the Federal Government."

Clifford and Miller, JJ., dissented, holding that the property of a municipality may be taxed, although the means and instrumentalities for conducting the public affairs of the city are exempt.

In *Lane County v. Oregon* (7 Wall., 71), held a State may require taxes to be paid in gold and silver coin.

Chase, Chief Justice (p. 77):

"In respect, however, to property, business, and persons, within their (the State) respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government. There is nothing in the Constitution which contemplates or authorizes any direct abridgment of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress."

In *Railroad Co. v. Peniston* (18 Wall., 5), State taxation of the property of the Union Pacific Railroad Company was sustained, although that corporation was

chartered by Congress in part for Government purposes. The above extract from *Lake Co. v. Oregon*, quoted and approved (p. 29).

Strong, J. (bottom p. 36):

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Bradley and Field dissent, holding the property non-taxable. In their opinion the following distinction is made between State and Federal taxation (bottom p. 48):

"But, it may asked, if the States can not tax a United States corporation created for public and national purposes, on what principle can the General Government tax local corporations created by the State governments for local and State purposes? If the States can not tax a national bank, how can the United States tax a State bank? The answer is very manifest, and is stated by Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheaton, 405): 'The government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers

are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them."

Again:

"It has also been insisted that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument which would sustain the right of the General Government to tax banks chartered by the States would equally sustain the right of the States to tax banks chartered by the General Government. But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power. When they tax the chartered institutions of the State, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the Government of the United States, it acts upon institutions created, not by their own constituents, but by the people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole and part, and the action of a part on the whole—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme."

California v. Pacific Railroad Co. (127 U. S., 1):
Held, that the franchise of the Pacific Railroad Company

could not be taxed. This was on the ground that the franchises were granted for national purposes. The case is not authority with respect to the taxation of a franchise granted for private ends. Moreover, the definition of a franchise given by Mr. Justice Bradley would not apply to the privilege of transmitting property by will or descent. The case is important in defining the arbitrary and unlimited power of taxation of franchises, and (ergo) of privileges.

Page 40 :

“Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends.”

Page 41 :

“The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the company against the tax imposed in the present cases.”

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

GEORGE T. MURDOCK, AS EXECUTOR of Jane H. Sherman, deceased, plain- tiff in error,	}	No. 458.
<i>v.</i> JOHN G. WARD, UNITED STATES COL- lector of internal revenue.		

GEORGE D. SHERMAN, PLAINTIFF IN error,	}	No. 459.
<i>v.</i> THE UNITED STATES.		

**BRIEF FOR THE UNITED STATES IN REPLY TO THAT OF EVARTS,
CHOATE & BEAMAN.**

I.

In the brief submitted for the holders of United States bonds by Evarts, Choate & Beaman attention is called to the refunding act of July 14, 1870 (16 Stat., 272), the resumption act of January 14, 1875 (18 Stat., 296), and the war-revenue act of 1898 (30 Stat., 467; sec. 33), under which the outstanding bonds of the Gov-

ernment were issued. The exemption clause of the refunding act of July 14, 1870, reads as follows :

All of which several classes of bonds and the interest thereon shall be exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority ; and the said bonds shall have set forth and expressed upon their face the above-specified conditions.

The resumption act of January 14, 1875, provides that the bonds authorized by it shall be issued with a like exemption.

The war-revenue act of 1898 contains the following provision :

And the bonds herein authorized shall be exempt from all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority.

All the bonds issued under these acts contain on their face the following exemption :

The principal and interest are exempt from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority.

It is insisted, indeed elaborately argued—

That the exemption operated as an inducement to investors to take the bonds at an exceptionally low rate of interest ;

That the exemption was incorporated into the bonds and became a contract between the Government and their holders ;

That this contract extends to the assigns of the hold-

ers, and to all assigns, those by operation of law as well as by act of the holders, thus assuring the benefit of the exemption to those who take by will or by the intestate laws of a State as well as those who take by transfer from the holder during life;

That the exemption is not only from the payment of taxes, but of *duties* of the United States, thus bringing this exaction, which is a "duty," within the express language of the clause.

II.

In the original brief filed by Mr. Patterson, who first raised, or attempted to raise, the question respecting the exemption of United States bonds, reference was made to section 3701, Revised Statutes, providing for the exemption of United States bonds from taxation by or under State, municipal, or local authority, but to no other statutory provision respecting exemption. Mr. Patterson appeared to concede there was no law exempting the outstanding United States bonds from Federal taxation, and based his argument for exemption upon the general ground that to exact the duty would amount to a dishonorable attempt on the part of the Government to escape the full payment of its lawful obligations and to the extent of the tax be a virtual repudiation of the promise to pay under the bonds. Naturally, in answering Mr. Patterson in my additional brief of December 13, 1899, I limited my argument to the claim made. He urged no statutory exemption, but a moral obligation. Discussing this I said I could not see why the United States might not tax

property invested in its own bonds; that it was a question of public policy; and assuming he had examined the statutes bearing upon the matter and stated them fully, I said the Government had never agreed, so far as I knew, not to tax property invested in its own bonds. At the same time, I pointed out that the Government has right along expressly prohibited the taxation of its bonds by any State, or municipality or local authority, and yet, nevertheless, the States have invariably computed inheritance taxes upon the portions of estates invested in United States bonds. They have done this because an inheritance tax is not a tax on property but on a privilege, the property being simply used as a means of ascertaining the value of the privilege taxed.

Now that my attention has been called to the provisions of the refunding act of 1870 and the subsequent statutes cited, I cheerfully concede that the law does provide for the exemption of the outstanding bonds of the United States and the interest thereon from the payment of all taxes or duties of the United States, as well as from taxation in any form by or under State, municipal, or local authority; but I submit that this statutory exemption does not change the situation nor affect the force of the argument already made on behalf of the Government.

III.

Before discussing this question of exemption I want to point out that no case properly presenting it is before the court. I believe a careful examination of the records in the *Murdock* and *Sherman* cases, Nos. 458 and 459, will lead to the conclusion that no decision is at present

required upon the question argued. Pages of elaborate discussion are submitted by counsel upon the question whether United States bonds which pass, either by will or by intestate laws, from a testator or intestate to his legatee or distributee are subject to this tax or duty, and yet no case presenting an instance of such passage or transmission is before the court.

Cases Nos. 458 and 459 present the same facts. Jane H. Sherman died possessed of a personal estate of the value of \$1,233,571. It is averred in each case that a considerable portion of this estate, at least one-third, consisted of United States bonds. She left a will, a copy of which appears in the record in No. 459, pages 4 to 11. This will contains a number of bequests of money. It contains no bequest of bonds. The executors were given authority to sell and dispose of the estate at public or private sale. In neither case is it averred that any specific bequest was made of any United States bonds owned by the testatrix at the time of her death. The only averment with respect to such bonds is that about one-third of the estate was invested in them at the time of her death.

Now, these are cases, not where United States bonds have passed from the testatrix to her legatees, but where a personal estate of a certain value in money has passed to the executors to be charged against them as money, to be turned into money, and to be distributed among the beneficiaries as provided by the will.

The court must pass upon the case presented in the record. The only averment is that the testatrix died possessed of an estate of which one-third consisted of

United States bonds. There the case stops. There is no allegation that these bonds have passed by the will to the legatees, or any of them. For aught that appears in the record, the executor and trustee may have sold every bond, may have distributed a portion of the proceeds in money among the legatees, and have invested the balance under the residuary clause in taxable securities. But if the bonds were not sold, and if a legatee entitled to a certain sum of money should accept United States bonds in lieu of money, this would be a matter of agreement between the legatee and the executor. The bonds would not be accepted and taken as bonds, but as the equivalent of money. In other words, the legatee would take not under the will but as a purchaser. This is pointed out in the opinion of Judge Butler, approved by the supreme court of Pennsylvania, in the leading case of *Strode v. Commonwealth*. (52 Pa. St., 181, 183.)

I have thus far treated the question as if the distribution was to be of the bonds. But in the case before us, as in all cases of general legacies and intestacy, this is not so. The law contemplates the reduction of the estate to money. It is as for money the administrator accounts, and it is only for money he can be compelled to account for distribution. The distributees can not be required to accept anything else. If the estate consists of ordinary bonds, they are collected; if of public bonds, they are sold in the market like other chattels of the deceased. Frequently, it is true, by an arrangement with the distributees, bonds and other securities are transferred to them in the stead of money, and equity might interfere to prevent a sale of such securities where the distributees offer to take them,

and a sale is unnecessary. But in such cases the distributees take from the administrator or executor, as any other transferee would, and must be regarded as purchasers. They agree to accept the bonds instead of the money to which they are entitled. It is, in effect, an investment of their shares in these securities.

If, therefore, the "collateral inheritance tax" could be regarded as a burden imposed on property belonging to the distributees, it would not be on the *bonds*, but on the *money* before it was thus invested.

IV.

It is insisted that the exemption clause in the refunding act of 1870 was inserted as an inducement to the investors to take the Government bonds at the exceptionally low rate of 4 per cent, and because of it they were purchased at 4 per cent. I suppose we may concede that the exemption clause was intended to have and did have some effect, but certainly not that claimed by counsel. The bonds were placed at a lower rate of interest because of the increase of wealth and the stability of the investment. This exemption clause has been in the law and the bonds ever since 1870 and the reduction of interest has gone on. The natural causes to which I allude have reduced the rate as much since then as it is claimed the exemption did at that time. There was an enormous demand for the 3 per cent loan placed in 1898, and the bonds then issued are now selling at a premium of 10 per cent. An examination of the current quotations in the New York papers will satisfy anyone that what I have mentioned are the controlling factors in deter-

mining the price of bonds, and therefore the rate of interest that must be paid. The $3\frac{1}{2}$ per cent bonds of the New York Central and Hudson River Railroad are not exempt from taxation, either State or Federal, and yet yesterday they sold at 99; the New York, Ontario and Western fours sold at 106; and the Pittsburg, Cincinnati, Chicago and St. Louis four-and-a-halves at $115\frac{1}{2}$. Counsel insist that the outstanding Government bonds were purchased in the belief that they would be exempt from a legacy tax should the Government see fit to impose one. Counsel insist that the bondholders still believe they are under the law so exempt. If so, and if this supposed exemption amounts to anything, then a decision that they are not exempt should and would affect their price. Yet I venture to say that the decision of this court sustaining the contention of the Government with respect to the bonds will not affect their price in the market the fractional part of a cent. British consols are not exempt from taxation, yet consider the low rate at which they have been placed.

V.

There is another reason why, as I contend, the alleged supposed exemption of United States bonds from a possible inheritance tax did not operate as an inducement to investors to take them, and had no effect whatever upon their price or the rate of interest at which they were placed. Prior to the passage of the refunding act of 1870, inheritance taxes had been levied, both by the States and the Federal Government. The Constitution, as interpreted by this court, forbade any State to tax in any manner the bonds of the United States, and this ex-

emption was incorporated into section 3701 of the Revised Statutes. Yet, notwithstanding this constitutional and statutory exemption, the States prior to 1870 and ever since have computed their inheritance taxes upon the portion of estates invested in United States bonds. Investors knew that the exemption from State and local taxation did not apply to a State inheritance tax; why should they believe that the exemption from Federal taxation would include a Federal inheritance tax? I deny there was any intention on the part of Congress, by inserting the exemption clause in the refunding act, to exempt the portion of an estate invested in United States bonds from either a State or Federal inheritance tax. There was doubtless the intention to exempt the bonds from any Federal tax, direct or indirect, levied upon the bonds, their income or any legal incident. Such a tax or duty (upon the income) had been levied and, I dare say, was intended to be prohibited by the exemption clause.

VI.

It is urged that the exemption clause was incorporated into the bonds and became a subsisting contract between the Government and their holders. I concede this. It is further contended that this contract extends to the assigns of the holders. I concede this, too. It is finally insisted that assigns must be taken to include all assigns, those by operation of law as well as by the act of the owner, thus including legatees and distributees. I do not concede this. Ownership includes power of disposition, but this is power of disposition during life. It has never been held, as a matter of common right, that because a man owned a thing he could dispose of it after

his death. If the ownership of property carried with it, as a matter of common right, the power to dispose of it after death, there would be no privilege of succession or inheritance to tax. Transmission by will or by law is therefore not an incident of property. Disposition after death is a privilege, not a right; it does not inhere in and attach to the bonds, and is therefore not covered by the exemption clause.

VII.

Counsel, citing cases, say that a tax upon all sales of property is a tax upon the property itself, and therefore a tax upon the succession or devolution of property is a tax upon the property itself. This is treating a transfer after death as the equivalent of a transfer during life. Such is not the law. The power of disposition during life is an incident of property, but power to dispose of it after death is a privilege conferred by the State. The first may not be taxed without taxing the property, but the second can be taxed as a privilege not incident to property. I ought to qualify the statement that a tax upon sales of property is a tax upon the property by stating that to make it such, the tax must be upon *all* sales of property. If you can't sell your property without paying a tax, of course your property is subject to a burden; there is a tax laid on it. But suppose the tax is only upon *certain* sales of property, sales taking place under peculiar circumstances, where a special privilege is enjoyed in making the sale. In that case the tax is not a tax upon the sale, or upon the property sold, but upon the privilege enjoyed in making the sale. Such is the case of *Nicol v. Ames*. The war-revenue act levied a tax "upon each sale, agree-

ment of sale, or agreement to sell, any products or merchandise at any exchange, or board of trade, or other similar place." The court held, however, that this tax was not one upon the sale, or upon the property sold, but upon the privilege or facility enjoyed in making the sale at an exchange or board of trade. So in the case at bar. In disposing of property after death, a peculiar privilege is involved. This privilege is sufficient to separate this transfer from all other transfers and make the tax one upon its distinguishing characteristic, the privilege itself, so the tax is not one upon the property which passes, but upon the privilege involved in the passage.

VIII.

Suppose the bonds do pass from the testator to his legatee. Did the owner, when he bought them, buy the right to thus transfer them? He did not. He acquired by purchase no such right. The State conferred the right, it granted the privilege, and so created a new subject-matter of taxation. In taxing this privilege, in ascertaining the contribution to be made because of its enjoyment, certain facts must be considered. The entire value of the estate is one, the value of the legacy or share is another, and the kinship of the legatee or distributee a third. These things are used as a means of measuring the value of the privilege enjoyed. But the property composing the estate, or the legacy, is no more taxed than is the degree of kinship of the legatee.

IX.

Counsel contend that the exemption is not only from the payment of taxes but of duties of the United States;

that the tax on legacies is a duty, and therefore comes within the express language of the law. I concede this exaction is a duty. I have so contended. But I do not concede that it is a duty upon the bonds. If it were a tax direct or indirect upon the bonds, then it would violate the exemption provision. It is begging the question to say that because it is a duty it is an indirect tax upon the bonds. The bonds are property. This is not a tax upon property either direct or indirect. It can not be sustained as a tax upon property. It is a tax upon a privilege which does not inhere in property, which is not an incident of property, which, it is true, is enjoyed with respect to property, but which, after all, is a privilege conferred by government and enjoyed under its protection, and consequently may be and is taxed as such.

X.

For the convenience of the court, and as a practical refutation of the charge, so vigorously pressed, that because of its graded feature the act is unequal, unjust, socialistic, and dangerous, I have taken the trouble to collect and print in the appendix an abstract of the inheritance tax laws of the United Kingdom and the British possessions throughout the world. The graded feature is adopted practically everywhere as a wise and fair provision. That Congress lacked power to adopt and enforce it here is inconceivable. The Government created by the Constitution is not so impotent.

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 27, 1900.

APPENDIX.

IN THE UNITED KINGDOM.

LEGACY AND SUCCESSION DUTIES.

(Whitaker's Almanack, 1900, p. 432.)

If the deceased died on or after the 1st June, 1881, every pecuniary legacy or residue, or share of residue, although not of the amount or value of £20, is chargeable with duty by the 44 Vict., c. 12, s. 42, except in the cases of small estates.

No succession duty is payable where the principal value of all the successions on the same death does not amount to £100 (16 and 17 Vict., c. 51, s. 18).

Rates of duties payable on legacies, annuities, and residues (£1 per cent legacy duty practically abolished since 1881), and of succession duties where deceased died before 1st July, 1888, or where estate duty, finance act, 1894, is payable (in which latter case 1 per cent is also practically abolished).

To children of the deceased, or their descendants, or to the father or mother or other lineal ancestor of the deceased, £1 per cent.

To brothers and sisters of the deceased, or their descendants, £3 per cent.

To brothers and sisters of the father or mother of the deceased, or their descendants, £5 per cent.

To brothers and sisters of the grandfather or grandmother of the deceased, or their descendants, £6 per cent.

To any person in any other degree of collateral consanguinity, or to a stranger in blood to the deceased, £10 per cent.

Where deceased died on or after 1 July, 1888, and probate or estate duty is not payable, succession duties for the relationships above are at rates of $1\frac{1}{2}$, $4\frac{1}{2}$, $6\frac{1}{2}$, $7\frac{1}{2}$, and $11\frac{1}{2}$, respectively.

The husband or wife is chargeable with estate duty, but not legacy or succession duty, and the husband or wife of a relation is chargeable at the rate at which the relation would be charged.

Penalties.—Persons paying or receiving any legacy, residue, or share of residue liable to duty, without taking or signing the proper receipt for the same. Persons not giving notice of a succession, or not delivering an account, are subject to certain penalties.

ESTATE DUTY.

(Whitaker's Almanack, 1900, pp. 430, 431.)

In the case of every person dying after 1st August, 1894 (prior to which date probate, affidavit, or inventory duty is payable), where the principal value of all property, real or personal, settled or not settled, passing on the death of such person, exceeds :

	Per cent.	
	£	s.
£100 and does not exceed £500.....	1	0
£500 and does not exceed £1,000.....	2	0
£1,000 and does not exceed £10,000.....	3	0
£10,000 and does not exceed £25,000.....	4	0
£25,000 and does not exceed £50,000.....	4	10
£50,000 and does not exceed £75,000.....	5	0
£75,000 and does not exceed £100,000.....	5	10
£100,000 and does not exceed £150,000.....	6	0
£150,000 and does not exceed £250,000.....	6	10
£250,000 and does not exceed £500,000.....	7	0
£500,000 and does not exceed £1,000,000.....	7	10
£1,000,000	8	

In calculating the duty the net value of an estate where the death occurred between 2d August, 1894, and 30th June, 1896, is raised to the next complete £10; and on deaths after that date any fraction of £100 is ignored, such adjusted value determining both the rate and amount of duty.

Gifts made by the deceased within a twelvemonth of death are subject to aggregation with the rest of the estate.

In addition to the above, where property liable to estate duty is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition, on the death of the deceased, to some person not competent to dispose thereof, a further duty is payable at the rate of £1 per cent on the settled property, but from that payment the *ad val.* stamp duty charged on the settlement may be deducted.

But where the net value of the property, real and personal, does not exceed £1,000, estate duty only is payable and the property is exempt from settlement estate duty and from legacy or succession duties.

Small estates up to £300 and £500 gross are charged, at the option of the accounting parties, either by the preceding scale or with fixed duties of 30s. and 50s., and are exempt from all other death duties.

Where the net value exceeds £100, but does not exceed £200, the *ad valorem* duty amounts to £1 only, provided that the death occurred on or after 1st July, 1896.

Interest at 3 per cent per annum is also payable on the estate duty on personalty from the date of the death up to that of delivery of the affidavit or account.

The estate duty on real property may be paid, if desired, by eight yearly or sixteen half-yearly installments, and that on certain annuities may, at option, be paid in four yearly installments, and 3 per cent interest is charged on all unpaid portions of duty in these cases from twelve months after death.

AUSTRALASIA.

NEW SOUTH WALES.

(Hanson's Death Duties, Fourth Edition, p. 717.)

The stamp duties act, 1880, 1886, 1894.

The duty is imposed on the estate of the deceased person, including his real estate in the colony.

The rates of duty are:

On the probate or letters of administration, to be granted in respect of any estate, real or personal, of any deceased person.

	Rate of duty per centum.
Where the value of such estate is under £200	Nil.
Where the value of such estate exceeds £200, and is under £5,000	1
Where the value of such estate exceeds £5,000, and is under £12,500	2
Where the value of such estate exceeds £12,500, and is under £25,000	3
Where the value of such estate exceeds £25,000, and is under £50,000	4
Where the value of such estate exceeds £50,000	5

NEW ZEALAND.

(Hanson, p. 718.)

The deceased persons' estates duties act, 1881, 1885, 1886.

The duty is in the nature of an estate duty, and is imposed on all real and personal property situate in New Zealand, including all debts, moneys, and choses in action receivable or recoverable in the said colony, the property of the deceased and which shall become vested in the administrator as such, notwithstanding that the deceased had a foreign domicile.

The duty is apportioned ratably on the property.

No duty is payable on property passing to the widow, and one-half of the duty payable on property passing to children or grandchildren of the deceased is remitted.

	Rate of duty, per cent.
Estate under £100.....	Nil.
Estate exceeding £100, but not exceeding £1,000.....	1 on first £100, 2½ on re- mainder.
Estate exceeding £1,000, but not exceeding £5,000....	3½
Estate exceeding £5,000, but not exceeding £20,000....	7
Estate exceeding £20,000.....	10

Strangers in blood (except adopted children), 3 per cent additional to the above rates.

QUEENSLAND.

(Hanson, p. 719.)

The succession and probate duties act, 1892, 1895.

This act imposes two duties, a probate and a succession duty.

This duty is chargeable on all property in Queensland whatever the domicile of the deceased.

Duty is payable on the grant of probate as follows (the duty on letters of administration being at double the rates for probate):

	Rate of duty per centum.
When the net value of the property of the deceased person in respect of which the grant of probate or letters of administration is made does not exceed £50.....	Nil.
Exceeds £50, but does not exceed £100.....	10s.
Exceeds £100, but does not exceed £200.....	£1
Exceeds £200, but does not exceed £500.....	£2
Exceeds £500.....	£5

The enactment, so far as it^a deals with succession duty, is modeled on the English succession duty act, the greater

portion of that act being reproduced verbatim. The duty is imposed on both real and personal property on a graduated scale, thus:

	Rate of duty, per cent.
If the whole succession or successions derived from the same predecessor and passing on the death of any person or persons amount in money or principal value to a sum less than £200.....	Nil.
Exceeding £200, but not exceeding £1,000	2
Exceeding £1,000, but not exceeding £2,500.....	3
Exceeding £2,500, but not exceeding £5,000.....	4
Exceeding £5,000, but not exceeding £10,000.....	6
Exceeding £10,000, but not exceeding £20,000.....	8
Exceeding £20,000.....	10

The wife, husband, or lineal issue of the predecessor pay at one-half the above rates, and a stranger in blood at double the above rates.

SOUTH AUSTRALIA.

(Hanson, p. 720.)

The succession duties act, 1893.

The duty is a succession duty and is imposed on property derived from a deceased person in so far as the property comprises, or is portion of, or payable out of:

- (a) Real property of the deceased in the province.
- (b) His personal property, wherever situate, if deceased was domiciled in the province at his death.
- (c) If the domicile of the deceased was foreign, his personal property in the province, including debts, money, and choses in action, receivable or recoverable by the administrator in the said province.

But all duty lawfully paid in any place out of the province in respect of property being out of the province and derived from any deceased person may be deducted from the duty to which the same property is liable under this act.

Rate of duty
per centum.

A. Where the net present value of property passing to any widow, widower, descendant, or ancestor of the deceased person or settlor or donor—

Exceeds £500 and does not exceed £700.....	a 1½
Exceeds £700 and does not exceed £1,000.....	a 2
Exceeds £1,000 and does not exceed £2,000.....	a 3
Exceeds £2,000 and does not exceed £3,000.....	3½
Exceeds £3,000 and does not exceed £7,000.....	4
Exceeds £7,000 and does not exceed £10,000.....	4½
Exceeds £10,000 and does not exceed £15,000.....	5
Exceeds £15,000 and does not exceed £20,000.....	5½
Exceeds £20,000 and does not exceed £30,000.....	6
Exceeds £30,000 and does not exceed £40,000.....	6½
Exceeds £40,000 and does not exceed £60,000.....	7½
Exceeds £60,000 and does not exceed £80,000.....	8
Exceeds £80,000 and does not exceed £100,000.....	8½
Exceeds £100,000 and does not exceed £150,000.....	9
Exceeds £150,000 and does not exceed £200,000.....	9½
Exceeds £200,000.....	10

B. Where the net present value of the property passing to a brother, sister, descendant of brother or sister, or any person in any other degree of collateral consanguinity to the deceased person, donor, or settlor does not exceed £200

Exceeds £200 but does not exceed £300	1½
Exceeds £300 but does not exceed £400	2
Exceeds £400 but does not exceed £700	3
Exceeds £700 but does not exceed £1,000	3½
Exceeds £1,000 but does not exceed £2,000.....	4
Exceeds £2,000 but does not exceed £3,000.....	5
Exceeds £3,000 but does not exceed £5,000.....	6
Exceeds £5,000 but does not exceed £10,000.....	7
Exceeds £10,000 but does not exceed £15,000.....	8
Exceeds £15,000 but does not exceed £20,000.....	9
Exceeds £20,000.....	10

A stranger in blood pays at the rate of 10 per cent in all cases.

TASMANIA.

(Hanson, p. 722.)

Probate duties act.

The duty is a probate duty, imposed on the net personal estate of the deceased; estates under £100 are

a Widow, or child under 21, pays half these rates.

exempt; duty at the rate of 2 per cent is payable on estates under £500, and at the rate of 3 per cent on estates over £500.

No duty is payable on "the amount received under any policy on the life of any deceased person, where, at the time of his decease, the same was held by him, or was held by trustees for such person, or for the wife or child of any such person."

VICTORIA.

(Hanson, p. 722.)

Administration and probate act, 1890, 1892.

The duty is payable on the value of the real and personal estate of the deceased, after deducting debts, and where a grant of probate or administration is limited to any special property the duty is payable on the value of that property after deducting the amount of any mortgages, charges, or liens thereon.

The rates of duty are as follows:

	Rate of duty per centum.
Value of estate does not exceed £1,000.....	nil.
Exceeds £1,000, but does not exceed £5,000.....	2
Exceeds £5,000, but does not exceed £6,000.....	3
Exceeds £6,000, but does not exceed £7,000.....	3½
Exceeds £7,000, but does not exceed £8,000.....	3¾
Exceeds £8,000, but does not exceed £9,000.....	3½
Exceeds £9,000, but does not exceed £10,000.....	3¾
Exceeds £10,000, but does not exceed £12,000.....	4
Exceeds £12,000, but does not exceed £14,000.....	4½
Exceeds £14,000, but does not exceed £16,000.....	4¾
Exceeds £16,000, but does not exceed £18,000.....	4½
Exceeds £18,000, but does not exceed £20,000.....	4¾
Exceeds £20,000, but does not exceed £22,000.....	5
Exceeds £22,000, but does not exceed £24,000.....	5½
Exceeds £24,000, but does not exceed £26,000.....	5¾
Exceeds £26,000, but does not exceed £28,000.....	5½
Exceeds £28,000, but does not exceed £30,000.....	5¾
Exceeds £30,000, but does not exceed £32,000.....	6

	Rate of duty per centum.
Exceeds £32,000, but does not exceed £34,000	6½
Exceeds £34,000, but does not exceed £36,000	6½
Exceeds £36,000, but does not exceed £38,000	6½
Exceeds £38,000, but does not exceed £40,000	6½
Exceeds £40,000, but does not exceed £44,000	7½
Exceeds £44,000, but does not exceed £48,000	7½
Exceeds £48,000, but does not exceed £52,000	7½
Exceeds £52,000, but does not exceed £56,000	7½
Exceeds £56,000, but does not exceed £60,000	7
Exceeds £60,000, but does not exceed £64,000	8
Exceeds £64,000, but does not exceed £68,000	8½
Exceeds £68,000, but does not exceed £72,000	8½
Exceeds £72,000, but does not exceed £76,000	8½
Exceeds £76,000, but does not exceed £80,000	8½
Exceeds £80,000, but does not exceed £84,000	9
Exceeds £84,000, but does not exceed £88,000	9½
Exceeds £88,000, but does not exceed £92,000	9½
Exceeds £92,000, but does not exceed £96,000	9½
Exceeds £96,000, but does not exceed £100,000	9½
Exceeds £100,000	10

WESTERN AUSTRALIA.

(Hanson, p. 724.)

The duty on deceased persons' estates act.

This act imposes a duty in the nature of an estate duty on the property, real and personal, comprised in any grant of probate or letters of administration, and upon the property comprised in any settlement containing trusts or dispositions to take effect after the death of the settlor (other than an antenuptial settlement, a post-nuptial settlement made in pursuance of an antenuptial agreement, a settlement on the wife or children of the settlor of property coming to him *jure uxoris*, or a settlement in favor of a purchaser or incumbrancer in good faith and for valuable consideration). All such voluntary settlements have to be registered within two months of the death of the settlor.

I. An estate under the value of £1,500.

II. The first £1,500 in an estate under the value of £2,500.

III. On property passing to parent, issue, husband, wife, or issue of husband or wife, one-half the ordinary rates of duty are payable.

	Rate of duty per centum.
Estate under £1,500	1 on excess above £500.
Exceeds £1,500, but does not exceed £5,000...	2 on whole value.
Exceeds £5,000, but does not exceed £10,000..	3 on whole value.
Exceeds £10,000, but does not exceed £20,000.	4 on whole value.
Exceeds £20,000, but does not exceed £30,000.	5 on whole value.
Exceeds £30,000, but does not exceed £40,000.	6 on whole value.
Exceeds £40,000, but does not exceed £60,000.	7 on whole value.
Exceeds £60,000, but does not exceed £80,000.	8 on whole value.
Exceeds £80,000, but does not exceed £100,000.	9 on whole value.
Exceeds £100,000.....	10 on whole value.

CANADA:

ONTARIO.

(Hanson, p. 725.)

The succession duty act, 1892. An act to make further provision for the payment of succession duty, etc.

The act does not apply—

(1) To any estate the value of which, after payment of all debts and expenses of administration, does not exceed \$10,000.

(2) To property given, devised, or bequeathed for religious, charitable, or educational purposes.

(3) To property passing under a will, intestacy, or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, where the aggregate value of the property of the deceased does not exceed \$100,000, and

(4) Where the value of the property devised, be-

queathed, or passing to any one person under a will or intestacy, does not exceed \$200, the same is exempt from duty.

A. Where the property of the deceased passes, either in whole or in part, to or for the benefit of the father, mother, husband, wife, child, grandchild, or other lineal descendant, daughter-in-law or son-in-law of the deceased, the same, or so much thereof as so passes, shall be subject, where aggregate value of the property of the deceased exceeds \$100,000, to duty at the rate of 2½ per cent; exceeds \$200,000, to duty at the rate of 5 per cent.

B. Where the property of the deceased exceeds \$10,000, so much thereof as passes to or for the benefit of the grandfather or grandmother, or any other lineal ancestor except the father or mother of the deceased, or to any brother or sister of the deceased, or to any descendants of such brother or sister, or to a brother or sister of the father or mother of the deceased, or any descendants of such last-named brother or sister, to duty at the rate of 5 per cent. Any person in any other degree of collateral consanguinity to the deceased or any stranger in blood, to duty at the rate of 10 per cent.

QUEBEC.

(Hanson, p. 726.)

An act respecting duties on successions and transfers of property.

"All transmissions, owing to death, of the property in usufruct or enjoyment of movable and immovable property" shall be liable to the following taxes, calculated

on the value of the property transmitted after deducting debts and charges existing at the time of the death:

Successor.	Value of estate.	Rate of duty per centum.
In the direct line, ascending or descending, consorts, father or mother in law, or son or daughter in law of the deceased.	Does not exceed \$3,000	Nil
	Exceeds \$3,000, but does not exceed \$5,000	a $\frac{1}{2}$
	Exceeds \$5,000, but does not exceed \$10,000	a 1
	Exceeds \$10,000, but does not exceed \$50,000 ..	a 1 $\frac{1}{2}$
	Exceeds \$50,000, but does not exceed \$100,000 .	a 1 $\frac{3}{4}$
	Exceeds \$100,000, but does not exceed \$200,000 .	a 2
Brother or sister or descendant of brother or sister of the deceased.	Exceeds \$200,000	a 3
	In all cases	3
Brother or sister or descendant of brother or sister of the father or mother of the deceased person.	In all cases	5
Brother or sister or descendant of brother or sister of the grandparents of the deceased.	In all cases	6
Any other collateral relative.	In all cases	8
Stranger	In all cases	10

a On the excess beyond \$3,000.

NEW BRUNSWICK.

(Hanson, p. 727.)

The succession duty act, 1892.

The acts are almost identical in drafting with the Ontario statutes.

The duty is a succession duty, and is imposed in precisely the same terms as those used in Ontario (*supra*, p. 725), and by a declaratory act (57 Viet., c. 6) it is explained that, in the case of a person who at the time of his death was an *inhabitant* of the province, the duties are payable on all his property, whether situate in the province or elsewhere.

(1) Any estate the value of which, after paying all debts and expenses of administration, does not exceed \$5,000.

(2) Property given, devised, or bequeathed for religious, charitable, or educational purposes.

(3) Property passing, under a will, intestacy, or otherwise, to or for the use of the father, mother, husband, wife, child,¹ daughter-in-law, or son-in-law of the deceased, when the aggregate value of the property of the deceased does not exceed \$50,000 in value; and

(4) Where the whole value of any property devised, bequeathed, or passing to any one person under a will or intestacy does not exceed \$200 the same is exempt from duty.

Rate of duty
per centum.

A. When the property of the deceased passes either in whole or in part to or for the benefit of the father, mother, husband, wife, child, brother, sister, daughter-in-law, or son-in-law of the deceased, the same, or so much thereof as so passes, shall be subject—

When the aggregate value of the property of the deceased exceeds \$50,000

1½ on the
first
\$50,000,
2½ on
remain-
der.

Exceeds \$200,000

5

B. Where the property of the deceased exceeds \$10,000, so much thereof as passes to or for the benefit of the grandfather or grandmother of the deceased, or any other lineal ancestor of the deceased, except the father and mother, or to any descendant of a brother or sister of the deceased, or to any brother or sister of a father or mother of the deceased, or any descendant of such last-named brother or sister

5

C. Where the property of the deceased exceeds \$5,000, so much thereof as passes to or for the benefit of any person in any other degree of collateral consanguinity, or to a stranger in blood

10

¹ Apparently no duty is payable in respect of property passing to the grandchildren or remoter issue of the deceased. The words "brother or sister" appear to have been accidentally omitted here.

Where the property of a deceased person liable to duty, or any part thereof, or any legacy or annuity out of the same goes to any person residing out of the province, the duty payable on the amount or portion going to such person is to be at double the above rates.

NOVA SCOTIA.

(Hanson, p. 728.)

The succession duty act, 1895.

This act is very similar to the Ontario act and the duty is imposed in the same terms as those used in that act, with the addition of the following words: "And all property, wheresoever situate or being, over which the executor or administrator shall or may exercise control, and which shall or may at any time come into his possession."

The act does not apply—

(1) To any estate the value of which, after payment of debts and expenses of administration, does not exceed \$5,000;

(2) To property passing, under a will, intestacy, or otherwise, to or for the benefit of the father, mother, husband, wife, child, grandchild,¹ brother, sister, daughter-in-law, or son-in-law, of the deceased, where the value of the property of the deceased, after payment of all debts and expenses of administration, does not exceed \$25,000 in value; and

(3) Where the whole value of any property devised, bequeathed, or passing to any one person under a will or intestacy does not exceed \$200, the same shall be exempt from duty.

A. Where the property of the deceased passes, either wholly or in part, to or for the benefit of the father,

¹ Apparently no duty is payable in respect of property passing to remoter issue of the deceased.

mother, husband, wife, child, grandchild, brother, sister, daughter-in-law, or son-in-law of the deceased, the same, or so much thereof as so passes, shall be subject to:

	Rate of duty per centum.
Where the aggregate value of the property of the deceased exceeds \$25,000.....	2½ on the excess above \$25,000
Where the aggregate value of the property of the deceased exceeds \$100,000.....	5 on the whole amount so passing

B. Where the property of the deceased exceeds \$5,000, so much thereof as passes to or for the benefit of:

	Rate of duty per centum.
The grandfather or grandmother of the deceased, or any other lineal ancestor of the deceased, except the father and mother, or to any descendant of a brother or sister of the deceased, or to a brother or sister of the father or mother of the deceased, or any descendants of such last-named brother or sister.....	5
Any other person in any other degree of collateral consanguinity to the deceased, or to a stranger in blood, save as aforesaid	10

Section 15 provides for the mode of payment of duty on annuities and section 16 for the mode of payment of duty on property limited by way of succession.

PRINCE EDWARD ISLAND.

(Hanson, p. 729.)

An act to provide for the payment of succession duty.

The act is similar to the Nova Scotia act, and the duty is imposed on similar terms to those used in that act.

The act does not apply—

(1) To any estate the value of which, after payment of all debts and expenses of administration, does not exceed \$3,000.

(2) To property given, devised, or bequeathed for religious, charitable, or educational purposes within the province.

(3) To property passing under a will, intestacy, or otherwise to or for the father, mother, husband, wife, child, grandchild, brother, sister, brother's child or sister's child, daughter-in-law, or son-in-law of the deceased, where the value of the property of the deceased, after payment of all debts and expenses of administration, does not exceed \$10,000 in value.

A. Where the property of the deceased passes, either wholly or in part, to or for the father, mother, husband, wife, child, grandchild, brother, sister, brother's child, or sister's child, daughter-in-law, or son-in-law of the deceased, the same, or so much thereof as so passes, shall be subject :

	Rate of duty per centum.
Where the value of the property of the deceased, after payment of all debts and expenses aforesaid, exceeds \$10,000	1½
Exceeds \$50,000.....	2½

B. Where the value of the property, after payment as aforesaid, exceeds \$3,000, so much thereof as passes to or for :

	Rate of duty per centum.
The grandfather or grandmother or any lineal ancestor of the deceased, except the father and mother, or to a brother or sister of the father or mother of the deceased, or any descendants of such last-mentioned brother or sister	2½
Any person in other degree of collateral consanguinity, or any stranger in blood, save as aforesaid	7½

Foreign administrations.—This act contains a section identical with that of Nova Scotia act on this subject.

BRITISH COLUMBIA.

(Hanson, p. 730.)

The succession duty act, 1894.

The duty is imposed in the same terms as in the Ontario act.

The act does not apply :

(1) To any estate the value¹ of which does not exceed \$5,000.

(2) To property passing, under a will, intestacy, or otherwise, to or for the use of the father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law of the deceased, where the aggregate value of the property of the deceased does not exceed \$25,000 :

	Rate of duty per centum.
Upon the value up to \$100,000.....	1
Where said value reaches \$100,000, but does not reach \$200,000	2
Where said value reaches \$200,000, but does not reach \$700,000	3
Where said value reaches \$700,000, but does not reach \$1,000,000.....	4
Where said value reaches \$1,000,000 or more	5

Provided that, subject to the preceding exemption (2) all the property in an estate exceeding \$25,000 that passes to or for the use of any one person, being the father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law of the deceased, under a will or intestacy, the first \$5,000 of the value of the same shall be exempt from payment of duty, and upon the excess above \$5,000 duty shall be charged at one-half the several aforesaid rates.

¹ Defined as meaning "fair market value after payment of the expenses of administration and all just debts and liabilities."

MANITOBA.

(Hanson, p. 731).

The succession duty act, 1893.

The duty is imposed in the same terms as those employed in the Ontario act.

The act does not apply—

(1) To any estate the value of which, after payment of all debts and expenses of administration, does not exceed \$4,000.

(2) To property passing under a will, intestacy, or otherwise to or for the use of the father, mother, husband, child, wife, grandchild, daughter-in-law, or son-in-law of the deceased, or one or more of such persons, where the value of the property so passing does not exceed \$25,000.

Value of property liable to duty.	Rate of duty per cent.
Up to \$25,000	1
Reaches \$25,000, but does not reach \$50,000	2
Reaches \$50,000, but does not reach \$100,000	3
Reaches \$100,000, but does not reach \$250,000	4
Reaches \$250,000, but does not reach \$500,000	5
Reaches \$500,000, but does not reach \$600,000	6
Reaches \$600,000, but does not reach \$700,000	7
Reaches \$700,000, but does not reach \$800,000	8
Reaches \$800,000, but does not reach \$900,000	9
Reaches \$900,000, but does not reach \$1,000,000	10
Reaches \$1,000,000 or more	10

Provided that where the whole value of any property devised, bequeathed, or passing to any one person, being the father, mother, husband, wife, child, grandchild, daughter-in-law, or son-in-law of the deceased, under a will or intestacy, does not exceed \$10,000 the same shall be exempt from duty.

FRANCE.

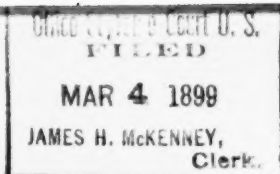
(Hanson, p. 733.)

The principal laws relating to death duties are the following:

- 22 Frimaire, An. VII. 18 July, 1836, s. 6.
- 28 April, 1816, s. 53. 18 May, 1850.
- 16 June, 1824, s. 3. 23 August, 1871, s. 34.
- 21 April, 1832, s. 33. 21 June, 1875.

They will be found under the title "Enregistrement" in Roger and Sorel, "Codes et Lois Usuelles," of which the twenty-sixth edition was published in 1894.

225
No. 729.



Motion to advance.
IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

Filed Mar. 4, 1899.

No. 729

SHIRLEY T. HIGH AND JESSIE M. HIGH, APPELLANTS,

vs.

FREDERICK E. COYNE, COLLECTOR, ETC., AND ELLEN T.
HIGH, EXECUTRIX, ETC., APPELLEES.

MOTION TO ADVANCE.

And now come said appellants, by A. M. Pence, their counsel, and move the court to advance said cause for argument and disposition, and assign the following reasons therefor and make the following statement:

1st. The bill filed seeks to impeach the constitutionality of sections 29, 30, and 31 of an act of Congress entitled "An act to provide ways and means to meet war expenditures and for other purposes," approved June 13, 1898.

2d. The sections in question impose a tax upon legacies and distributive shares of personal property exceeding ten thousand dollars derived from persons dying subsequent to

said enactment, there being an exemption of the portion going to the widow, and it also provides for the method of collecting same.

3d. Appellants are the children and legatees of James L. High, who died testate October 3, 1898, in Chicago, Cook county, Illinois, where his will was probated, and in and by his will he devised and bequeathed all his estate, real and personal, to his widow and said appellants, his only children, share and share alike, and appointed his widow, Ellen T. High, his executrix.

That the personal estate so bequeathed exceeds two hundred and fifteen thousand dollars (\$215,000), and the share of the tax so imposed by such statute upon the estates so bequeathed to appellants exceeds two thousand dollars (\$2,000).

That Frederick E. Coyne, who is collector for the first district, Illinois, seeks to collect such tax and demands a return of such tax and the payment thereof to him as such collector by said executrix, and threatens to collect the same by due process of law, and such executrix threatens to make such return and pay said tax if not enjoined; that such tax, if valid, is a lien upon the real estate so devised to appellants by said testator as well as upon the said legacies.

4th. The bill filed sets forth the facts above stated, and alleges that said proposed tax is invalid, and that said act is unconstitutional for the following reasons:

(a.) That the tax in question is a direct tax upon the legacies in question, both in legal effect and by the express terms of the act, and is not apportioned by said act among the States according to population, as required by the Constitution.

(b.) That if it be an indirect tax it is not uniform in its operations, for the reason that it exempts from its operation

all legacies under the value of ten thousand dollars (\$10,000).

(c.) That the right of inheritance, if it be a tax upon the privilege of inheriting, is within the exclusive power of the States to grant and regulate and is not subject to abridgment or taxation by the General Government.

That the bill prays that the portion of the statute in question be held unconstitutional and the said tax to be void, and to remove the lien of such tax as a cloud upon their real estate so devised to them, and that said collector be enjoined from demanding and collecting said tax and said executrix from paying same.

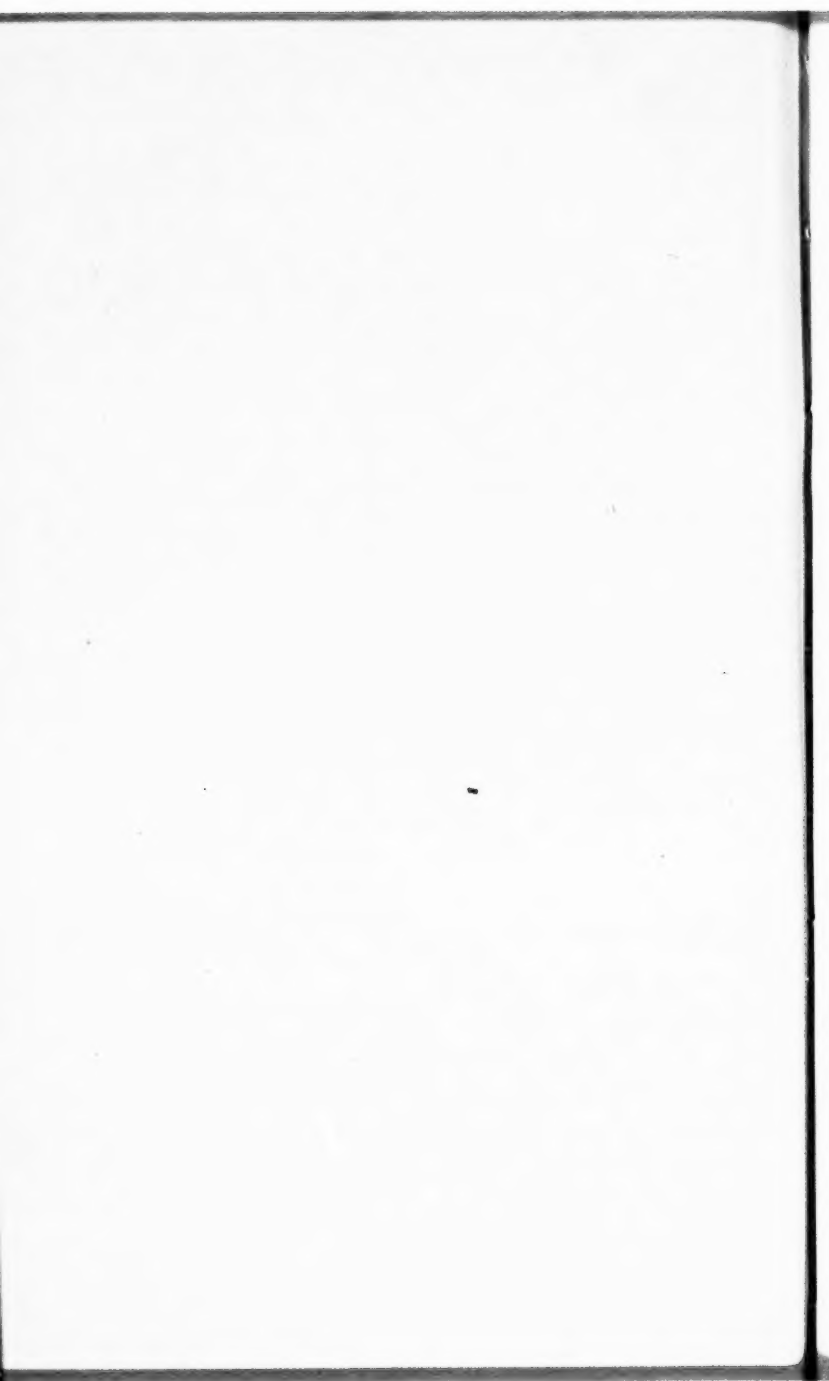
5th. A general demurrer was filed both by the collector and the executrix, and upon a hearing the bill was dismissed for want of equity. The opinion of the court will be found on page 21 of the Transcript.

An appeal was prayed and allowed and a bond given which was made a supersedeas.

6th. That the collection of the revenues of the Government are interfered with by such litigation and the rights of appellants are interfered with. Wherefore said cause ought to be advanced and the said questions so raised be determined within a short day.

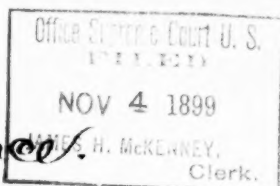
Respectfully submitted.

A. M. PENCE,
Counsel for Appellants.



No. 384.

Motion to advance.



Supreme Court of the United States, ¹

OCTOBER TERM, 1899. No. 387.

Filed Nov. 4, 1899.

EBEN J. KNOWLTON and THOMAS
A. BUFFUM, Executors of the
Last Will and Testament of
Edwin F. Knowlton, de-
ceased,

Plaintiffs in Error,

vs.

Notice of Motion
to Advance.

²

FRANK R. MOORE, United States
Collector of Internal Revenue,
First Collection District, State
of New York.

In error to the Circuit Court of the United States for
the Eastern District of New York.

To Hon. JOHN K. RICHARDS,
Solicitor General of the United States:

³

Notice is hereby given that the plaintiffs in error
in the above entitled cause will move the Supreme
Court of the United States on Monday, November
6, 1899, or as soon thereafter as the motion can be
heard, to advance the above entitled cause on the
docket and assign the same for argument on the 4th
day of December, 1899, upon the grounds stated in
said motion, a copy of which is hereto attached.

J. G. CARLISLE,

For Plaintiffs in Error.

4 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899. No. 387.

EBEN J. KNOWLTON and THOMAS
A. BUFFUM, Executors of the
Last Will and Testament of
Edwin F. Knowlton, de-
ceased,

Plaintiffs in Error,

vs.

Motion to Ad-
vance.

5

FRANK R. MOORE, United States
Collector of Internal Reve-
nue, First Collection District,
State of New York.

In error to the Circuit Court of the United States
for the Eastern District of New York.

And now come the plaintiffs in error, by their
attorney, J. G. Carlisle, and move the Court to ad-
vance the above entitled cause on the docket and
assign the same for argument on Monday, Decem-
ber 4, 1899, to be heard with the case of High *et al.*
6 *vs. Coyne et al.* (No. 729).

This action was brought in the United States Cir-
cuit Court for the Eastern District of New York
against Frank R. Moore, Collector of Internal Reve-
nue, to recover the sum of \$42,084.67, with inter-
est, on account of taxes paid under protest on the
personal estate of Edwin F. Knowlton, under the
29th and 30th Sections of the Act of Congress ap-
proved June 13, 1898, imposing a tax upon per-
sonal property held in charge or trust by
administrators, executors and trustees for
the satisfaction and payment of legacies

and distributive shares. The ground upon which 7
the recovery is sought is that the said sections are
unconstitutional and the said tax invalid. The
Court below held the said sections to be constitu-
tional and that the said tax was valid, and, upon
demurrer, dismissed the complaint with costs. This
writ of error is prosecuted to reverse that judgment.

The case of *High et al. vs. Coyne et al.*, above re-
ferred to, involves the same question as to the con-
stitutionality of the law and the validity of the said
tax, and has been advanced by order of the Court
and assigned for hearing on the 4th day of Decem-
ber, 1899.

J. G. CARLISLE, 8
For Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED
STATES.

*The Fidelity Insurance, Trust and
Safe Deposit Company, Executor
under the will of Daniel Craig,
Deceased, Plaintiff in Error,*

vs.

*Penrose A. McClain, Defendant in
Error.*

Of October Sessions,
1899.

No. .

IN ERROR TO THE CIRCUIT COURT OF THE
UNITED STATES FOR THE EASTERN DISTRICT
OF PENNSYLVANIA.

TO THE HONORABLE THE JUDGES OF THE SUPREME COURT:

The petition of the Fidelity Insurance, Trust and Safe
Deposit Company, executor as aforesaid, respectfully shows:

First. The writ of error in this case was taken by your petitioner as plaintiff from a judgment of the Circuit Court of the United States, for the Eastern District of Pennsylvania, in a case therein pending, wherein Penrose A. McClain, Collector of United States Internal Revenue for the First District of Pennsylvania, was defendant. The action was brought to recover money paid by the plaintiff to the Collector under protest after demand made by the Collector for taxes assessed against the plaintiff as executor of the estate of Daniel Craig, deceased. Said assessment was made under sections 29, 30 and 31, of the Act of Congress approved June 13, 1898,

entitled: "an Act to provide ways and means to meet war expenditures and for other purposes."

In the declaration filed by the plaintiff in the Circuit Court, recovery of the amount thus paid under protest was sought upon the ground that the Act of Congress was in derogation of rights secured to citizens of the United States by the provisions of the Federal Constitution as follows:—

(a.) Article 1, section 8:—

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

(b.) Article 1, section 2, paragraph 3:—

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

To this declaration the defendant demurred upon the ground that the Act of Congress was constitutional.

The court below in a brief opinion of which a copy is annexed to this petition, sustained the demurrer and entered judgment for the defendant.

A writ of error was then taken to this court in accordance with the provisions of section 699 of the Revised Statutes, which provide:—

"A writ of error may be allowed to review any final judgment at law * * * without regard to the sum or value in dispute. * * *

"*Third.*—Any final judgment of the Circuit Court * * * in any civil action against an officer of the revenue for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the Treasury.

"*Fourth.*—Any final judgment at law * * * of any Circuit Court * * * in any case brought on account of the deprivation of any right, privilege, or immunity secured by the Constitution of the United States."

Second.—Your petitioner further shows to your Honorable Court that there is now pending upon the docket of your Honorable Court, as of October Sessions, 1899, No. 225, an appeal from a decree of the Circuit Court of the United States for the Northern District of Illinois, in which Shirley

T. High *et al.*, executors, are appellants, and F. E. Coyne, Collector, is appellee, in which the Circuit Court of the United States for the Northern District of Illinois refused to enjoin the said Coyne, as Collector, from enforcing the payment of a tax due by the appellants under the same statute, and that, upon said appeal, the question of the constitutionality of said Act of Congress of June 13th, 1898, is raised.

Third.—Your petitioner shows that, in addition to the amount involved in the present suit, in which judgment was entered against it by the Circuit Court of the United States for the Eastern District of Pennsylvania, your petitioner is executor of other estates upon which the estimated amount of the tax exceeds \$350,000, and although the tax in said other estates has not yet been assessed, it is of the greatest importance for the prompt settlement and distribution of said estates that the question raised upon this record should be promptly determined.

Wherefore your petitioner prays your Honorable Court to make an order directing that this cause should be advanced upon the docket, and should be heard in connection with or immediately after said case of High *vs.* Coyne, October Sessions, 1899, No. 225, which your petitioner is informed is assigned for argument on December 4th, 1899.

And your petitioner will ever pray.

THE FIDELITY INSURANCE, TRUST AND SAFE
DEPOSIT COMPANY,

H. GORDON MCCOUCH,

Secretary.

RICHARD C. DALE,
SAMUEL DICKSON,
JOHN C. BULLITT,

Of Counsel.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.

H. Gordon McCouch, being duly sworn according to law, doth depose and say, I am the secretary of the petitioner, the statements contained in the foregoing petition are just and true as I verily believe.

H. GORDON McCOUCH.

Sworn and subscribed to before me, this fourteenth day of November, 1899.

W. C. HARRIS,
Notary Public.

UNITED STATES CIRCUIT COURT.

*The Fidelity Insurance, Trust and
Safe Deposit Company, Executor
under the will of Daniel Craig,*

vs.

Penrose A. McClain.

October Sessions, 1899.

No. 2.

BY THE COURT, DALLAS AND MCPHERSON, JJ.:

The demurrer filed to the plaintiff's statement of demand raises the question whether the succession tax or duty imposed by sections 29, 30, and 31 of the Act of Congress approved June 13th, 1898, is in conflict with the provisions of the Federal Constitution. Two clauses of the Constitution are invoked:—

(a.) Article I., section 8, which provides as follows:—

"The Congress shall have power to lay and collect taxes, duties, imposts, and excises to pay the debts, and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States."

(b.) Article I., section 2, paragraph 3, which provides as follows:—

"Representatives and direct taxes shall be apportioned among the several States which may be included in this Union, according to their respective numbers."

This question has already been considered by the Circuit Court of the United States for the Northern District of Illinois, in the case of *High vs. Coyne*, 93 Fed. Rep., 450, and the contention of the plaintiff that the statute is in conflict with the Federal Constitution was not sustained.

The court is informed that the case is now pending, on appeal, in the Supreme Court of the United States.

In view of the great importance of the question and the necessity of its ultimate determination by the court of last resort, we feel that it is proper for this court to follow the decision of the Circuit Court in Illinois without any independent examination of question presented.

We therefore sustain the demurrer to the plaintiff's statement, and direct that judgment in this cause be entered for the defendant.



No. 458.

Motion to advance.

FILED

DEC 1 1899

JAMES H. MCKENNEY,
Clerk.

Supreme Court of the United States,

Filed Dec. 1, 1899.

OCTOBER TERM, 1899. No. 458

GEORGE T. MURDOCK, as executor, etc.,

Plaintiff in Error,

AGAINST

JOHN G. WARD, Collector of Internal Revenue, etc.,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

To the HON. JOHN K. RICHARDS,
Solicitor General of the United States:

Notice is hereby given that the plaintiff in error in the above entitled cause will move the Supreme Court of the United States, on Monday, November 27th, 1899, or as soon thereafter as the motion can be heard, to advance the above entitled cause on the docket, and to assign the same for argument on the 4th day of December, 1899, upon the grounds stated in said motion, a copy of which is hereto attached.

CHARLES E. PATTERSON and

ALPHEUS T. BULKELEY,

Attorneys for Plaintiff in Error.

6

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1899. No.

7	GEORGE T. MURDOCK, as executor, etc., Plaintiff in Error, AGAINST JOHN G. WARD, Collector of Internal Revenue, etc., Defendant in Error.	}	Motion to Advance.
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8 In Error to the Circuit Court of the United States for the Southern District of New York:

And now comes the plaintiff in error, by his attorneys, Charles E. Patterson and Alpheus T. Bulkeley, and moves the Court to advance the above entitled cause on the docket, and to assign the same for argument on Monday, December 4th, 1899, to be heard with the case of *High et al. vs. Coyne et al.* (No. 720). 225).

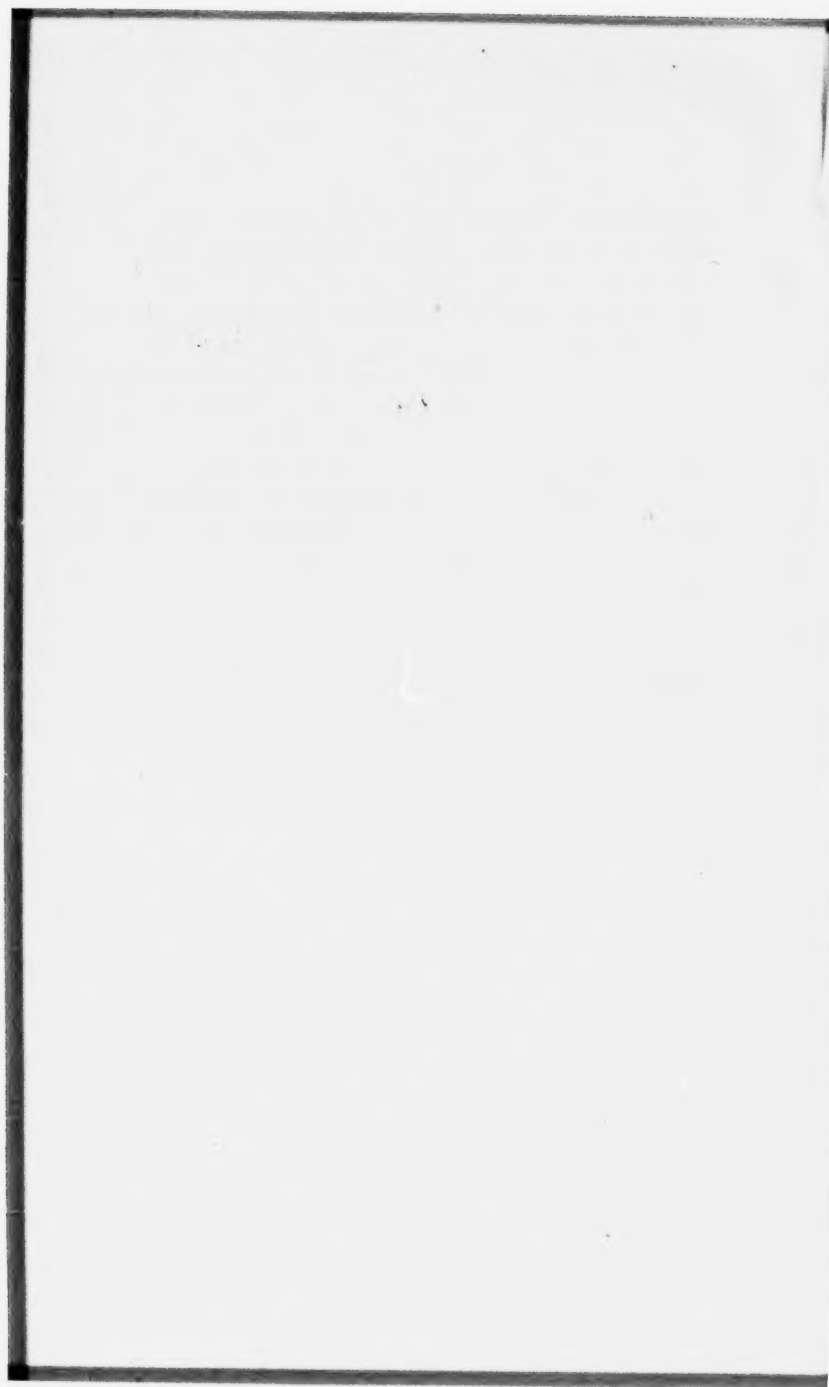
9 This action was brought in the Supreme Court of the State of New York, against John G. Ward, Collector of Internal Revenue, to recover the sum of \$36,827.53, with interest, on account of taxes paid under protest, and assessed against the said George T. Murdock, because of his being executor of the last will and testament of Jane H. Sherman, deceased, under and pursuant to
 10 the provisions of the 29th and 30th Sections of the Act of Congress, approved June 13, 1898, imposing a tax upon personal property held in charge or trust by administrators, executors and trustees, for the satisfaction and payment of legacies and distributive shares. The ground upon which the recovery is sought is, that the

Act of Congress imposing said tax is unconstitutional, and the said tax invalid. The case was removed from the State Court to the Circuit Court of the United States, where the Court held the Act imposing said tax to be constitutional, and that the said tax was valid, and upon demurrer, dismissed the complaint, with costs. This writ of error is prosecuted to reverse that judgment. 11

The case of *High, et al. vs. Coyne, et al.*, above referred to, involves the same question as to the constitutionality of the law, and the validity of the said tax, and has been advanced by order of the Court, and assigned for hearing on the 4th day of December, 1899. 12

This involves, except as to the method of procedure, the same questions that are involved in the case of *High vs. Coyne*, except that there is also involved in the present case, the power of the Congress of the United States to impose such a tax as is here complained of upon government bonds, or the inheritance or transfer of government bonds, and upon an income derived from government bonds. 13

CHARLES E. PATTERSON and
ALPHEUS T. BULKELEY,
Attorneys for Plaintiffs in Error. 14



FILED

DEC 1 1899

JAMES H. McKENNEY,
Clerk.

N^o. 459.
Motion to advance.

Supreme Court of the United States,

OCTOBER TERM, 1899. No. 459
Filed Dec. 1, 1899.

GEORGE D. SHERMAN,
Plaintiff in Error,
against
THE UNITED STATES,
Defendant in Error.

2

In Error to the Circuit Court of the United States for
the Northern District of New York.

3

To the HON. JOHN K. RICHARDS,
Solicitor General of the United States:

Notice is hereby given, that the plaintiff in error in
the above entitled cause will move the Supreme Court of
the United States, on Monday, November 27th, 1899,
or as soon thereafter as the motion can be heard, to ad-
vance the above entitled cause on the docket, and to as-
sign the same for argument on the 4th day of Decem-
bere, 1899, upon the grounds stated in said motion, a
copy of which is hereto attached.

4

CHARLES E. PATTERSON and
ALPHEUS T. BULKELEY,
Attorneys for Plaintiff in Error.

5

6

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899. No.

7	GEORGE D. SHERMAN, Plaintiff in Error, <i>against</i> THE UNITED STATES, Defendant in Error.	}	Motion to Advance.
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In Error to the Circuit Court of the United States for
 the Northern District of New York.

8 And now comes the plaintiff in error, by his attorneys, Charles E. Patterson and Alpheus T. Bulkeley, and moves the Court to advance the above entitled cause on the docket, and to assign the same for argument on Monday, December 4th, 1899, to be heard with the case of *Hugh et al v. Coyne et al.* (No. 729). 225).

9 This action was brought by petition filed in the United States Court for the Northern District of New York, against the United States, to recover the sum of \$8,969.02, with interest, on account of taxes paid under protest by one George T. Murdock, as executor of the last will and testament of Jane H. Sherman, deceased, under the provisions of the 29th and 30th Sections of the Act of Congress, approved June 13, 1898, imposing a tax upon personal property held in charge or trust by
 10 administrators, executors and trustees, for the satisfaction and payment of legacies and distributive shares, and which said sum of \$8,969.02 was because of the provisions of said Act, and the demand therefor from said executor, paid by said executor from the income and share of said estate, otherwise payable to the plaintiff in error, as a legatee under the will of said deceased.

The ground upon which the recovery is sought is, that 11
the sections of said Act imposing said tax are unconstitutional, and the said tax is invalid, and the payment of
the same by said executor was involuntary, and under
duress, and the money having been paid to the defendant
by said executor, the plaintiff in error is entitled to
have and recover the amount so paid by said executor,
deducted from the legacy to the plaintiff in error, as 12
money had and received by the defendant in error, to
and for the use of the plaintiff in error. The Court below
held the said sections to be constitutional, and that
the said tax was valid, and upon demurrer, dismissed
the petition of the plaintiff in error, with costs. This
writ of error is prosecuted to reverse that judgment.

The case of *Hugh et al v. Coyne et al.*, above referred 13
to, involves the same question as to the constitutionality
of the law, and the validity of the said tax, and has been
advanced by order of the Court, and assigned for hearing
on the 4th day of December, 1899. The questions
involved upon the hearing of the present appeal are the
same as the questions involved in the case of *Hugh v.*
Coyne, except that the plaintiff in error claims as an 14
additional ground to errors assigned in the case of *Hugh*
v. Coyne, that a large portion of the estate of Mrs. Sherman
consisted of government bonds, and the portion of
the estate set apart to create an income for the benefit
of the plaintiff in error, under the provisions of the will
of Mrs. Sherman, consisted of government bonds,
which were not liable, and the income from which was
not liable, to assessment and taxation.

CHARLES E. PATTERSON and

ALPHEUS T. BULKELEY,

Attorneys for Plaintiff in Error.



No. 458 and 459.

Motion for Leave to File Briefs
IN THE
Supreme Court of the United States.

FILED

JAN 6 1900

JAMES H. MCKENNEY,

OCTOBER TERM, A. D. 1899.

Filed Jan. 6, 1900.

GEORGE T. MURDOCK, *Executor, &c., Plaintiff in*
Error,
vs.
JOHN G. WARD, *Collector, &c.,* } No. 458.

and

GEORGE D. SHERMAN, *Plaintiff in Error,*
vs.
UNITED STATES. } No. 459.

MOTION FOR LEAVE TO FILE ADDITIONAL BRIEFS.

Now comes Frederic D. McKenney, Esquire, in behalf of Messrs. Evarts, Choate & Beaman, counsellors-at-law, and represents to the court that said counsellors have as clients certain owners of bonds of the United States, who are greatly interested in the questions presented for decision in the above cases, and particularly in the question of the validity and effect of the tax sought to be imposed under the provisions of the act of June 13, 1898, commonly known as the War Revenue law of 1898, upon transfers of such Government bonds, and moves this honorable court to grant leave unto said solicitors to file briefs in said causes within such limits of time as to the court may seem reasonable and right.

FREDERIC D. MCKENNEY,
In Behalf of Messrs. Evarts, Choate & Beaman.

Syllabus.

KNOWLTON *v.* MOORE.¹

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EAST-
ERN DISTRICT OF NEW YORK.

No. 387. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

The plaintiffs in error were the executors of the will of Edwin F. Knowlton, of Brooklyn, New York. The defendant in error was the United States Collector of Internal Revenue for the First Collection District for the State of New York. Mr. Knowlton died at Brooklyn in October, 1898, and his will was duly proved. Under the portion of the act of Congress of June 13, 1898, which is printed at length in a note to the opinion of the court in this case, the United States Collector of Internal Revenue demanded of the executors a return, showing the amount of the personal estate of the deceased, and the legatees and distributees thereof. This return the executors made under protest, asserting that the act of June 13 was unconstitutional. This return showed that the personal estate amounted to over two and a half millions of dollars, and that there were several legacies, ranging from under \$10,000 each to over \$1,500,000. The collector levied the tax on the legacies and distributive shares, but for the purpose of fixing the rate of the tax considered the whole of the personal estate of the deceased as fixing the rate for each, and not the amount coming to each individual legatee under the will. As the rates under the statute were progressive from a low rate on legacies amounting to \$10,000, to a high rate on those exceeding \$1,000,000, this decision greatly increased the aggregate amount of the taxation. The executors protested on the grounds, (1) that the provisions of the act were unconstitutional; (2) that legacies amounting to less than \$10,000, were not subject to any tax or duty; (3) that a legacy of \$100,000, taxed at the rate of \$2.25 per \$100, was only subject to the rate of \$1.12½. Demand having been made by the collector for payment, payment was made under protest; and, after the Commissioner of Internal Revenue had refused to refund any of it, the executors commenced suit to recover the amount so paid. The Circuit Court sustained a demurrer upon the ground that no cause of action was alleged, and dismissed the suit, which was then brought here by writ of error. *Held:*

- (1) That the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate;

¹ The docket title of this case is *Eben J. Knowlton and Thomas A. Buffum, executors of the last will and testament of Edwin F. Knowlton, deceased, plaintiffs in error, v. Frank B. Moore, United States Collector of Internal Revenue, First Collection District, State of New York.*

Counsel for Parties.

- (2) That it makes the rate of the tax depend upon the character of the links connecting those taking with the deceased, being primarily determined by the classifications, and progressively increased according to the amount of the legacies or shares ;
- (3) That the court below erred in denying all relief, and that it should have held the plaintiffs entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived.

Death duties were established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and an examination of all shows that tax laws of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately vested.

When a particular construction of a statute will occasion great inconvenience, or produce inequality and injustice, that view is not to be favored if another and more reasonable interpretation is present in the statute.

The provision in section 8 of article I of the Constitution that "all duties, imports and excises shall be uniform throughout the United States," refers purely to a geographical uniformity, and is synonymous with the expression "to operate generally throughout the United States."

The statute considered in this case embraces the District of Columbia.

THE case is stated in the opinion of the court.

Mr. John G. Carlisle, Mr. Wheeler H. Peckham and Mr. Charles H. Otis for plaintiffs in error. *Mr. Peter B. Olney, Mr. William Edmond Curtis, Mr. Henry M. Ward, Mr. Ward B. Chamberlin, Mr. George F. Chamberlin, Mr. Julien T. Davies, Mr. Frederic R. Coudert, Jr., Mr. E. S. Mansfield and Mr. W. S. V. Hopkins* were on Mr. Carlisle's brief. *Mr. Thomas B. Reed, Mr. Thomas Thacher and Mr. Charles H. Otis* filed briefs for plaintiffs in error.

Mr. Solicitor General for defendants in error.

Mr. John G. Carlisle and Mr. Henry M. Ward filed an additional brief, and *Mr. Wheeler H. Peckham, Mr. Peter B. Olney and Mr. William Edmond Curtis* were on this brief, and

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Mr. Thomas B. Reed and *Mr. Thomas Thacher* for plaintiffs in error filed a brief in response to the suggestion of the court by its order of February 26, 1900, etc. *Mr. Solicitor General* filed a supplemental brief in response to the suggestion of the court.

MR. JUSTICE WHITE delivered the opinion of the court.

The act of Congress of June 13, 1898, c. 448, which is usually spoken of as the War Revenue Act, (20 Stat. 448,) imposes various stamp duties and other taxes. Sections 29 and 30 of the statute, which are therein prefaced by the heading "Legacies and Distributive Shares of Personal Property," provide for the assessment and collection of the particular taxes which are described in the sections in question. To determine the issues which arise on this record it is necessary to decide whether the taxes imposed are void because repugnant to the Constitution of the United States, and if they be valid, to ascertain and define their true import.

The controversy was thus engendered: Edwin F. Knowlton died in October, 1898, in the borough of Brooklyn, State of New York, where he was domiciled. His will was probated, and the executors named therein were duly qualified. As a preliminary to the assessment of the taxes imposed by the provisions of the statute, the collector of internal revenue demanded of the executors that they make a return showing the amount of the personal estate of the deceased, and disclosing the legatees and distributees thereof. The executors, asserting that they were not obliged to make the return because of the unconstitutionality of sections 29 and 30 of the statute, nevertheless complied, under protest. The report disclosed that the personal estate was appraised at \$2,624,029.63, and afforded full information as to those entitled to take the same. The amount of the tax assessed was the sum of \$42,084.67. This was reached according to the computation shown in the table which is printed on the following page.

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Names of persons entitled to beneficial interest in said property.	Relation-ship of beneficiary to person who died possessed.	Clear value of legacy.	Amount taxable.	Rate for every \$100.	Amount of tax.
Mary, Countess von Francken Siers- torpf \$ 1,065. Cash legacy 100,000. Income for life on residu- ary estate, amounting to \$2,348,724.67. Countess Siers torpf became 28 years of age on July 2, 1898. Present value of her life interest in said residuary estate, esti- mated according to Uni- ted States tables is, . . . \$1,630,931.35 Total	Daughter	\$1,731,996.35	\$1,731,996.35	2.25	38,903.92
George W. Knowlton	Brother . . .	100.00	100.00	2.25	2.25
Charlotte A. Batchelor	Sister . . .	5,000.00	5,000.00	2.25	112.50
Eben J. Knowlton	Brother . . .	100,000.00	100,000.00	2.25	2,250.00
Unitarian Church of West Upton, Mass.	None . . .	5,000.00	5,000.00	15.	750.00
The remainder of said residuary es- tate is subject to contingencies, and the individuals to whom it may become entitled to the same on their death, in view of the uncertainty of degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is \$717,803.30 Total . . . . .	. . . . .	717,803.30	\$1,842,096.35	. . . . .	42,084.67

It is apparent, from the table, that the collector, whilst levying the tax on the legacies and distributive shares, or the right to receive the same, yet, for the purpose of fixing the rate of the tax, took into view the whole of the personal estate of the deceased. That is, whilst the tax was laid upon the legacies, the rate thereof was fixed by a separate and distinct right or thing, the entire personal estate of the deceased. The executors protested against the entire tax, and also as to the method by which it was assessed. The grounds of the protest were as follows:

"1. The provisions of the act of Congress under which it is sought to impose, assess and collect the said tax or duty are in

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violation of the provisions of article I, sections 8 and 9, of the Constitution of the United States, and are therefore void.

"2. The legacies to George W. Knowlton, Charlotte A. Batchelor, the Unitarian Church of West Upton, Mass., each amount to less than \$10,000, and are not subject to any tax or duty under the said provisions of the said act of Congress, even if such provisions be not unconstitutional and void.

"3. The legacy to Eben J. Knowlton, a brother of the testator, amounts to only \$100,000, and under the said provisions of the said act should be taxed at the rate of $\$1.12\frac{1}{2}$ per \$100, and not at the rate of $\$2.25$ per \$100, even if said act be not unconstitutional and void."

Demand having been made by the collector for the payment, accompanied with a threat to distrain in case of refusal, the tax was paid under written protest, which repeated the grounds above stated. In the receipt given it was recited that the tax had been paid under protest to avoid the use of compulsory process. A petition for refunding was subsequently presented, by the executors, in which the grounds of the protest were reiterated. The Commissioner of Internal Revenue having made an adverse ruling, the present suit was commenced to recover the amount paid. The facts as to the assessment and collection of the taxes were averred, and the refusal of the internal revenue commissioner to refund was alleged. The petition for refunding was made a part of the pleadings. The right to repayment was based upon the averment that the sections of the statute, under authority of which the amount had been assessed and collected, were unconstitutional. The Circuit Court sustained a demurrer, on the ground that no cause of action was alleged. The claim was rejected, and the suit was dismissed with costs.

The questions which arise on this writ of error, to review the judgment of the Circuit Court, are fourfold: First, that the taxes should have been refunded because they were direct taxes, and not being apportioned were hence repugnant to article 1, section 8, of the Constitution of the United States; second, if the taxes were not direct, they were levied on rights created solely by state law, depending for their continued existence on the consent of the several States, a volition which Congress

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has no power to control, and as to which it could not, therefore, exercise its taxing authority ; third, if the taxes were not direct, and were not assessed upon objects or rights which were beyond the reach of Congress, nevertheless the taxes were void, because they were not uniform throughout the United States, as required by article 1, section 9, of the Constitution of the United States ; fourth, because, although the taxes be held to have been in all respects constitutional, nevertheless they were illegal, since in their assessment the rate of the tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares, or the right to take the same, which were the objects upon which by law the taxes were placed.

Although it may be, in the abstract, an analysis of these questions, in logical sequence, would require a consideration of the propositions in the order just stated, we shall not do so for the following reasons : The inquiry whether the taxes are direct or indirect must involve the prior determination of the objects or rights upon which by law they are imposed and assessed, since it becomes essential primarily to know what the law assesses and taxes in order to completely learn the nature of the burden. So, also, to solve the contention as to want of uniformity, it is requisite to understand not only the objects or rights which are taxed, but the method ordained by the statute for assessing and collecting. This must be the case, since uniformity, in whatever aspect it be considered, involves knowledge as to the operation of the taxing law, an understanding of which cannot be arrived at without a clear conception of what the law commands to be done. For these reasons we shall first, in a general way, consider upon what rights or objects death duties, as they are termed in England, are imposed. Having, from a review of the history of such taxes, reached a conclusion on this subject, we shall decide whether Congress has power to levy such taxes. This being settled, we shall analyze the particular act under review, for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs. These questions being disposed of, we

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shall determine whether the taxes which the act imposes are void, because not apportioned or for the want of uniformity.

It is conceded on all sides that the levy and collection of some form of death duty is provided by the sections of the law in question. Bearing this in mind, the exact form of the tax and the method of its assessment need not be presently defined, since doing so appropriately belongs to the more specific interpretation of the statute to which we shall hereafter direct our attention. Taxes of this general character are universally deemed to relate, not to property *eo nomine*, but to its passage by will or by descent in cases of intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property disassociated from its transmission or receipt by will, or as the result of intestacy. Such taxes so considered were known to the Roman law and the ancient law of the continent of Europe. Smith's *Wealth of Nations*, London ed. of 1811, vol. 3, p. 311. Continuing the rule of the ancient French law, at the present day in France inheritance and legacy taxes are enforced, being collectible as stamp duties. They are included officially under the general denomination of indirect taxes, for the reason that all inheritance and legacy taxes are considered as levied on the "occasion of a particular isolated act." This view of the inheritance and legacy tax conforms to the official definition of indirect taxes, among which inheritance and legacy taxes are classed, which prevails in France at the present day. The definition is as follows:

"Direct taxes bear immediately upon persons, upon the possession and enjoyments of rights; indirect taxes are levied upon the happening of an event or an exchange."

In Germany and other continental countries in various forms death duties are enforced, in the main, by way of stamp duties. They are there, both in theory and in practice, treated as resulting from the occasion of death, and hence as not legally equivalent with taxes levied on property merely because of its

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ownership. Cohn's Science of Finance (Veblen's translation), secs. 282, 283, 350; Dos Passos' Inheritance Tax Law, sec. 1.

The term "Death Duties," by which inheritance and legacy taxes, in whatever form imposed, are described in England, indicates the generic nature of such taxes. In Hanson's Death Duties, p. 1, it is said: "Historically, probate duty is the oldest form of death duty, having been established in 1694." The probate duty thus referred to was a fixed tax dependent on the sum of the personal estate within the jurisdiction of the probate court, payable on the grant of letters of probate by means of stamp duties, and was treated as an expense of administration to be deducted out of the residue of the estate. In 1780 this tax was supplemented by what became known as a legacy tax, at first collected by means of a stamp affixed to the receipt, evidencing the payment of a legacy or share in the personal property of a deceased person. It is unnecessary to consider the change in the mere form of this latter tax. The tax was not deducted as an expense of administration, but was charged and collected upon the passing of the individual legacies or interests upon which it was imposed. In 1853 the probate duty tax and the legacy tax, just referred to, were supplemented by a tax known as the succession duty. This law reached interests in real estate passing or acquired by the death of a person and interests in personal property not covered by the legacy act. This also was not treated as an expense of administration, but was charged upon and collected out of the particular interests subjected to the tax.

The nature of the succession duty is shown by the second section of the act defining the same, which is thus condensed by Hanson at page 40 of his treatise:

"Succession duty is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person (called the predecessor) to another person (called the successor). Property chargeable with this tax is called a succession."

By the Finance Act of 1894, the probate duty was superseded by what was termed the estate duty. This, like the probate

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duty, was a tax distinct from those imposed by the Legacy and Succession Duty Acts upon the receipt of real or personal property, or an interest therein, although in some administrative features it modified or regulated the subject of a succession duty. This tax is payable out of the general revenue of the estate. *Re Bourne*, (1893) 1 Ch. 188, cited by Hanson at p. 354.

The principle upon which the tax rests is thus stated by Hanson at p. 63 :

“The new duty imposed by the Finance Act, and called estate duty, as has been said above, supersedes probate duty ; but the key to the construction of the Finance Act lies in remembering that the new estate duty, although it is leviable on property which was left untouched by probate duty, such as real estate, yet is in substance of the same nature as the old probate duty. What it taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. Unless this principle is kept clearly in view, the mind is constantly tempted by the wording of the act to revert to principles of succession duty which have no real connection with the subject.”

This summary suffices to indicate the origin, the development and the theory underlying death duties. A full analysis thereof will be found in Dowell's *History of Taxation*, vol. 3, p. 148, *et seq.* ; in Hanson's *Death Duties* ; and in the treatise of Dos Passos, section 4, and notes, where the various acts are referred to.

In the colonies of Great Britain death duties, as a general rule, obtain. Some of the statutes are modeled upon those of the mother country, and levy taxes on legacies, etc., passing, measured by their value and on the estate proper. Others, again, have merely the estate tax without the legacy tax. The statutes are reviewed in the appendix to Hanson's treatise, beginning at page 717.

A retrospective study of the death duty laws enacted in our own country, national and state, will show that they rest upon the same fundamental conception which has caused the adoption of like statutes in other countries ; and, especially in their national development, do they substantially conform (to the

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extent to which they go) to the evolution of the system in England.

As early as 1797 Congress imposed a legacy tax. Act of July 6, 1797, c. 11, 1 Stat. 527. This act was probably the outgrowth of a recommendation contained in a report of the Committee of Ways and Means, presented in the House on Tuesday, March 17, 1796. Annals of Congress, Fourth Congress, first session, pp. 993, *et seq.* The report recommended, 1, the collection of two millions of dollars by a direct tax; 2, the imposition of "a *duty* of two per centum ad valorem . . . on all testamentary dispositions, descents and successions to the estates of intestates, excepting those to parents, husbands, wives or lineal descendants;" 3, the imposition of various stamp duties; and, 4, an increase of the duty on carriages. The act of 1797 continued in force until June 30, 1802. 2 Stat. 148, c. 17. In this act, as in the English legacy duty statute of 1780 and supplementary statutes, the mode of collection provided was by stamp duties laid on the receipts evidencing the payment of the legacies or distributive shares in personal property, and the amount was, like the English legacy tax, charged upon the legacies and not upon the residue of the personal estate. The text of the statute is printed in the margin.¹

¹ Chapter XI, July 6, 1797.

"SECTION 1. *Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That from and after the thirty-first day of December next, there shall be levied, collected and paid throughout the United States, the several stamp duties following, to wit: For every skin or piece of vellum, or parchment, or sheet or piece of paper upon which shall be written or printed any or either of the instruments or writings following, to wit: . . . any receipt or other discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount whereof shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars, fifty cents; and for every further sum of five hundred dollars, the additional sum of one dollar. . . . Provided, That nothing in this act contained shall extend to charge with a duty any legacy left by any will or other testamentary instrument, or any share or part of a personal estate, to be divided by*

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In sections 111 and 112 of chapter 119, act of July 1, 1862, 12 Stat. 433, 485, a legacy tax was again enacted. Like in character to the act of 1797, this was a tax imposed on legacies or distributive shares of personal property. But in the same chapter was contained still another form of death duty. By section 194 a probate duty, proportioned to the amount of the estate and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, was to cause the death duties imposed by Congress to greatly resemble those then existing in England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty chargeable against the mass of the estate. The only difference between the system created by the act of 1862 and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate passing by death were subjected to a duty. A detailed reference to the provisions of the act of 1862 need not be made, because we shall have occasion to do so in considering the legislation which, in 1864, in effect reënacted, although largely increasing the rates, both the probate duty or tax on the whole estate and the legacy tax on each particular legacy or distributive share. The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress — leaving out of view the differences in rates and the administrative provisions — were substantially identical, and of a threefold nature, that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a succession duty charged against each interest in real property. The act of 1864 was amended in several particulars by the act of July 13, 1866. 14 Stat. 140. These amend-

force of any statute of distributions which shall be left to, or divided amongst, the wife, children, or grandchildren of the person deceased intestate, or making such will or testamentary instrument, or any recognizance, bill, bond, or other obligation or contract, which shall be made to or with the United States, or any State, or for their use respectively."

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ments, however, did not materially modify the system of taxation provided in the act of 1864.

Whilst the general plan of the act of 1864 shows that its framers had in mind the English law, this fact was conclusively demonstrated by section 127, wherein the succession or real estate inheritance tax was defined in substantially similar terms to that contained in the English Succession Duty Act. The identity of the conception embodied in the act of 1864 with that existing in England was observed by this court in *Scholey v. Rew*, 23 Wall. 331, where, in holding that the subject matter of the assessment of a succession tax was the devolution of the estate or the right to become beneficially entitled to the same, etc., the court said (p. 349):

“Decided support to the proposition that such is the true theory of the act is derived from the fact that the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction.”

In the statute of August 27, 1894, 28 Stat. 509, c. 349, what was in effect a legacy tax was imposed by the provisions of section 28. *Ib.* 553. The tax was *eo nomine* an income tax, but was in one respect the legal equivalent of a legacy tax, since among the items going to make up the annual income which was taxed was “money and the value of all personal property acquired by gift or inheritance.” This law was not enforced. Its constitutionality was assailed on the ground that the income tax, in so far as it included the income from real estate and personal property, was a direct tax within the meaning of the Constitution, and was void because it had not been apportioned. The contention was twice considered by this court. On the first hearing, in *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429, it was decided that, to the extent that the income taxes included the rentals from real estate, the tax was a direct tax on the real estate, and was therefore unconstitutional, because not apportioned. Upon the question of whether the unconstitutionality of the tax on income from real estate rendered it legally impossible to enforce all the other taxes provided by the statute, the court was equally divided in opinion.

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Ib. 586. On a rehearing (158 U. S. 601) the previous opinion was adhered to, and it was moreover decided that the tax on income from personal property was likewise direct, and that the law imposing such tax was therefore void because not providing for apportionment. The court said (p. 637):

“*Third.* The tax imposed by sections twenty-seven to thirty-seven, inclusive, of the act of 1894, so far as it falls on the income of real estate and of personal property, being a direct tax within the meaning of the Constitution, and, therefore, unconstitutional and void because not apportioned according to representation, all those sections, constituting one entire scheme of taxation, are necessarily invalid.”

The decision, that the invalidity of the income tax, in the particulars quoted, carried with it the other and different taxes which were included in income, was not predicated upon the unconstitutionality of such other taxes, but solely upon the conclusion that by the statute there was such an inseparable union between the elements of income derived from the revenues of real estate and personal property and the other constituents of income provided in the statute, that they could not be divided. The court said (p. 637):

“We do not mean to say that an act laying by apportionment a direct tax on all real estate and personal property, or the income thereof, might not also lay excise taxes on business, privileges, employments and vocations. But this is not such an act, and the scheme must be considered as a whole. Being invalid as to the greater part, and falling, as the tax would, if any part were held valid, in a direction which could not have been contemplated except in connection with the taxation considered as an entirety, we are constrained to conclude that sections twenty-seven to thirty-seven, inclusive, of the act, which became a law without the signature of the President on August 28, 1894, are wholly inoperative and void.”

An inheritance and legacy tax imposed by one of the States (Louisiana) was considered in *Mayer v. Grima*, 8 How. 490. The opinion of the court, delivered by Mr. Chief Justice Taney, upheld the right to levy such taxes. The same subject was passed on in *United States v. Perkins*, 163 U. S. 625. The

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question was whether property bequeathed to the United States could be lawfully included in a succession tax. It was decided that it could be. In the opinion, delivered by Mr. Justice Brown, it was said (p. 628):

"The tax is not upon the property in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded its contribution to the State that it becomes the property of the legatee."

Again (p. 629):

"That the tax is not a tax upon the property itself, but upon its transmission by will or descent, is also held, both in New York and in several other States."

Yet again (p. 630):

"We think that it follows from this that the act in question is not open to the objection that it is an attempt to tax the property of the United States, since the tax is upon the legacy before it reaches the hands of the Government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislature assents to a bequest of it."

Once more, quite recently, the subject was considered in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283. The issue for decision was this: A law of the State of Illinois imposed a legacy and inheritance tax, the rate progressing by the amount of the beneficial interest acquired. This progression of rates was assailed in the courts of Illinois as being in violation of the constitution of that State, requiring equal and uniform taxation. The state court having decided that the progressive feature did not violate the constitution of the State, the case came to this court upon the contention that the establishment of a progressive rate was a denial both of due process of law and of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution. These complaints were held to be untenable. In the course of its opinion the court, speaking through Mr. Justice McKenna, after briefly adverting to the history of inheritance and legacy taxes

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in other countries, referred to their adoption in many of the States of the Union as follows (pp. 287-288):

"In the United States they were enacted in Pennsylvania in 1826; Maryland, 1844; Delaware, 1869; West Virginia, 1887, and still more recently in Connecticut, New Jersey, Ohio, Maine, Massachusetts, 1891; Tennessee in 1891, chapter 25, now repealed by chapter 174, Acts, 1893. They were adopted in North Carolina in 1846, but repealed in 1883. Were enacted in Virginia in 1844, repealed in 1855, reënacted in 1863, and repealed in 1884. Other States have also enacted them—Minnesota by constitutional provision.

"The constitutionality of the taxes have been declared, and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S. 625, 628; *Strode v. Commonwealth*, 52 Penn. St. 181; *Eyre v. Jacob*, 14 Grat. 422; *Schoolfield v. Lynchburg*, 78 Virginia, 366; *State v. Dalrymple*, 70 Maryland, 294; *Clapp v. Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479; *State v. Hamlin*, 86 Maine, 495; *State v. Alston*, 94 Tennessee, 674; *In re Wilmerding*, 117 California, 281; *Dos Passos Collateral Inheritance Tax*, 20; *Minot v. Winthrop*, 162 Mass. 113; *Gelsthorpe v. Furnell*, (Montana) 51 Pac. Rep. 267. See also *Scholey v. Rew*, 23 Wall. 331.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is a creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the States may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation."

Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of

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her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union, the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested.

Having ascertained the nature of death duties, the first question which arises is this: Can the Congress of the United States levy a tax of that character? The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several States, therefore the levy by Congress of a tax on inheritances or legacies, in any form, is beyond the power of Congress, and is an interference by the National Government with a matter which falls alone within the reach of state legislation. It is to be remarked that this proposition denies to Congress the right to tax a subject-matter which was conceded to be within the scope of its power very early in the history of the government. The act of 1797, which ordained legacy taxes, was adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish. Even the then members of the Congress who had not been delegates to the convention, which framed the Constitution, must have had a keen appreciation of the influences which had shaped the Constitution and the restrictions which it embodied, since all questions which related to the Constitution and its adoption must have been, at that early date, vividly impressed on their minds. It would, under these conditions, be indeed surprising if a tax should have been levied without question upon objects deemed to be beyond the grasp of Congress because exclusively within state authority.

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It is, moreover, worthy of remark that similar taxes have at other periods and for a considerable time been enforced; and, although their constitutionality was assailed on other grounds held unsound by this court, the question of the want of authority of Congress to levy a tax on inheritances and legacies was never urged against the acts in question. Whilst these considerations are of great weight, let us for the moment put them aside to consider the reasoning upon which the proposition denying the power in Congress to impose death duties must rest.

Confusion of thought may arise unless it be always remembered that, fundamentally considered, it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties. The qualification of such taxes as privilege taxes, or describing them as levied on a privilege, may also produce misconception, unless the import of these words be accurately understood. They have been used where the power of a state government to levy a particular form of inheritance or legacy tax has in some instances been assailed because of a constitutional limitation on the taxing power. Under these circumstances, the question has arisen whether, because of the power of the State to regulate the transmission of property by death, there did not therefore exist a less trammelled right to tax inheritances and legacies than obtained as to other subject-matters of taxation, and, upon the affirmative view being adopted, a tax upon inheritances or legacies for this reason has been spoken of as privilege taxation, or a tax on privileges. The conception, then, as to the privilege, whilst conceding fully that the occasion of the transmission or receipt of property by death is a usual subject of the taxing power, yet maintains that a wider discretion or privilege is vested in the States, because of the right to regulate. Courts which maintain this view have therefore treated death duties as disenthralled from limitations which would otherwise apply, if the privilege of regulation did not exist. The authorities which maintain this doctrine have been already referred to in the citation which we have made from *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 288. An illustration is found in

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United States v. Perkins, 163 U. S. 625, where the right of the State of New York to levy a tax on a legacy bequeathed to the Government of the United States was in part rested on the privilege enjoyed by the State of New York to regulate successions. Some state courts, on the other hand, have held that, despite the power of regulation, no greater privilege of taxation exists as to inheritance and legacy taxes than as to other property. *Cope's Appeal*, 191 Penn. St. 1; *State v. Ferris*, 53 Ohio St. 314; *State v. Gorman*, 40 Minn. 232; *Curry v. Spencer*, 61 N. H. 624. In *State v. Switzler*, 143 Missouri, 287, the power of the legislature of Missouri to levy a uniform tax upon the succession of estates was conceded, though such tax was declared not to be a tax upon property in the ordinary sense. The court nevertheless held that the particular tax in question, which was progressive in rate, was invalid, because it violated a provision of the state constitution; the decision, in effect, being that because the legislature had the power to regulate successions, it was not thereby justified in levying a tax which was not sanctioned by the state constitution.

All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course, in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress.

It is not denied that, subject to a compliance with the limitations in the Constitution, the taxing power of Congress extends to all usual objects of taxation. Indeed, as said in the *License Tax Cases*, 5 Wall. 462, 471, after referring to the limitations expressed in the Constitution, "Thus limited, and thus only, it (the taxing power of Congress) reaches every subject, and may be exercised at discretion." The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or

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receipt of property by death. This proposition is supported by a reference to decisions holding that the several States cannot tax or otherwise impose burdens on the exclusive powers of the National government or the instrumentalities employed to carry such powers into execution, and, conversely, that the same limitation rests upon the National government in relation to the powers of the several States. *Weston v. Charleston*, 2 Pet. 449; *McCulloch v. Maryland*, 4 Wheat. 316, 431, 439; *Bank of Commerce v. New York City*, 2 Black, 620; *Collector v. Day*, 11 Wall. 113, 124; *United States v. Railroad Co.*, 17 Wall. 322, 327; *Railroad Co. v. Peniston*, 18 Wall. 5.

But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several States on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate. But when it is accurately stated, the proposition denies the authority of the States to tax objects which are confessedly within the reach of their taxing power, and also excludes the National government from almost every subject of direct and many acknowledged objects of indirect taxation. Thus imports are exclusively within the taxing power of Congress. Can it be said that the property when imported and commingled with the goods of the State cannot be taxed, because it had been at some prior time the subject of exclusive regulation by Congress? Again, interstate commerce is often within the exclusive regulating power of Congress. Can it be asserted that the property of all persons or corporations engaged in such commerce is not the subject of taxation by the several States, because Congress may regulate interstate commerce? Conveyances, mortgages, leases, pledges, and, indeed, all property and the contracts

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which arise from its ownership, are subject more or less to state regulation, exclusive in its nature. If the proposition here contended for be sound, such property or dealings in relation thereto cannot be taxed by Congress, even in the form of a stamp duty. It cannot be doubted that the argument when reduced to its essence demonstrates its own unsoundness, since it leads to the necessary conclusion that both the National and state governments are divested of those powers of taxation which from the foundation of the government admittedly have belonged to them. Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the State to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, 431, "that the power to tax involves the power to destroy." This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation: that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the National and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established. The contention was adversely decided in the *License Tax Cases*,

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supra, where (p. 470) the court said: "We come now to examine a more serious objection to the legislation of Congress in relation to the dealings in controversy. It was argued, for the defendants in error, that a license to carry on a particular business gives no authority to carry it on; that the dealings in controversy were parcel of the internal trade of the State in which the defendants resided; that the internal trade of a State is not subject, in any respect, to legislation by Congress, and can neither be licensed nor prohibited by its authority; that licenses for such trade, granted under acts of Congress, must, therefore, be absolutely null and void; and, consequently, that penalties for carrying on such trade without such license could not be constitutionally imposed." The court, after thus stating the argument, decided that the license was a mere form of excise taxation; that it conferred no right to carry on the business (the selling of lottery tickets and the liquor traffic) if forbidden to be engaged in by the State, but license was applicable whenever under the state law such business was permitted to be done. Many other opinions of this court have pointed out the error in the proposition relied on, and render it unnecessary to do more than refer to them. *Lane County v. Oregon*, 7 Wall. 71, 77; *Veazie Bank v. Fenno*, 8 Wall. 533, 547; *National Bank v. Commonwealth*, 9 Wall. 353, 362; *Collector v. Day*, 11 Wall. 113, 127; *United States v. Railroad Company*, 17 Wall. 322, 327; *Railroad Co. v. Peniston*, 18 Wall. 5, 36; *California v. Central Pacific Railroad Co.*, 127 U. S. 1, 40.

We are then brought to a consideration of the particular form of death duty, which is manifested by the statute under consideration. The sections embodying it are printed in the margin.¹

¹ Act of June 13, 1898, ch. 448.

SEC. 29. That any person or persons having in charge or trust as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of \$10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale

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It is at the outset obvious that the exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views. It is plain, however, that the statute must mean one of three things:

or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows, that is to say: Where the whole amount of said personal property shall exceed in value \$10,000, and shall not exceed in value the sum of \$25,000, the tax shall be—

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother or sister to the person who died possessed of such property as aforesaid, at the rate of seventy-five cents for each and every \$100 of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed as aforesaid, at the rate of one dollar and fifty cents for each and every \$100 of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the persons so died possessed as aforesaid, at the rate of three dollars for each and every one hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than as hereinbefore stated, or shall be a stranger in blood to the person who died possessed as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of \$25,000, but shall not exceed the sum or value of \$100,000, the rates of duty or tax above set forth shall be multiplied by one and one half, and where the amount or value of said property shall exceed the sum of \$100,000, but

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1. The tax which it imposes is on the passing of the whole amount of the personal estate, with a progressive rate depending upon the sum of the whole personal estate; or,

shall not exceed the sum of \$500,000, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of \$500,000 but shall not exceed the sum of \$1,000,000, such rates of duty shall be multiplied by two and one half; and where the amount or value of said property shall exceed the sum of \$1,000,000, such rates of duty shall be multiplied by three.

SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator or trustee, before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay, to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list or statement shall contain the names of each and every person entitled to any beneficial interest therein, together with the clear value of such interest, the duplicate of which schedule, list or statement shall be by him immediately delivered, and the tax thereon paid to such collector; and upon such payment and delivery of such schedule, list or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator or trustee to be credited and allowed such payment by every tribunal which, by laws of any State or Territory, is or may be empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list or statement of such legacies, property or personal estate under oath as aforesaid, or shall neglect or refuse to deliver the schedule, list or statement of such legacies, property or personal estate under oath as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property or personal estate, or give the names and relationship of

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2. The tax which it levies is placed on the passing of legacies or distributive shares of personal property at a progressive rate, the amount of such rate being determined, not by the separate sum of each legacy or distributive share, but by the volume of the whole personal estate. This is the mode in which the tax was computed by the assessor, and which was sustained by the court below ; or,

3. The tax is on the passing of legacies or distributive shares

the persons entitled to beneficial interest therein untruly, or shall not truly and correctly set forth and state therein the clear value of such beneficial interest, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon; and the collector shall commence appropriate proceedings before any court of the United States, in the name of the United States, against such person or persons as may have the actual or constructive custody or possession of such property or personal estate, or any part thereof, and shall subject such property or personal estate, or any portion of the same, to be sold upon the judgment or decree of such court, and from the proceeds of such sale the amount of such tax or duty, together with all costs and expenses of every description to be allowed by such court, shall be first paid, and the balance, if any, deposited according to the order of such court, to be paid under its direction to such person or persons as shall establish title to the same. The deed or deeds, or any proper conveyance of such property or personal estate, or any portion thereof, so sold under such judgment or decree, executed by the officer lawfully charged with carrying the same into effect, shall vest in the purchaser thereof all the title of the delinquent to the property or personal estate sold under and by virtue of such judgment or decree, and shall release every other portion of such property or personal estate from the lien or charge thereon created by this act. And every person or persons who shall have in his possession, charge or custody any record, file or paper containing, or supposed to contain, any information concerning such property or personal estate as aforesaid, passing from any person who may die as aforesaid, shall exhibit the same at the request of the collector or deputy collector of the district, and to any law officer of the United States, in the performance of his duty under this act, his deputy or agent, who may desire to examine the same. And if any such person, having in his possession, charge or custody any such records, files or papers, shall refuse or neglect to exhibit the same on request as aforesaid, he shall forfeit and pay the sum of \$500: *Provided*, That in all legal controversies where such deed or title shall be the subject of judicial investigation, the recital in said deed shall be *prima facie* evidence of its truth, and that the requirements of the law had been complied with by the officers of the government.

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of personalty, with a progressive rate on each, separately determined by the sum of each of such legacies or distributive shares.

On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which describes what is taxed, not as the estates of deceased persons, but as "legacies and distributive shares of personal property." This, whilst not conclusive, is proper to be considered in interpreting the statute, when ambiguity exists and a literal interpretation will work out wrong or injury. *United States v. Fisher*, 2 Cranch, 358, 386; *United States v. Palmer*, 3 Wheat. 610, 631; *United States v. Union Pacific Railroad*, 91 U. S. 72; *Smythe v. Fiske*, 23 Wall. 374, 380; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550.

The opening words of section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, . . . passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, . . . shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows: that is to say," etc.

Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property. This is made clearer by considering that in the very same section the tax is described as being upon "any interest which may have been transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. That is to say, whilst the law places the duty on any legacy or distributive share passing by death, it puts a like

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burden on gifts which may have been made in contemplation of death and otherwise than by last will and testament.

Following the paragraph from which the foregoing has been quoted, the statute makes five distinct classes or enumerations, whereby the rate of the tax is varied, that is, it is made more or less, depending upon the relationship, or want of relationship, of the legatee or distributee to the deceased. But this enumeration can only be explained upon the hypothesis that the law intended to impose a greater or less tax upon a legatee or distributee, arising from his degree of relationship or his being a stranger in blood to the deceased. Thus it cannot be doubted that, in assessing the tax, the position of each separate legatee or distributee must be taken into view in order to ascertain the primary rate which the statute establishes. One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate. On the other hand, if the whole sum of the taxation on all the shares, calculated on the basis of the relationship of each beneficiary and the amount received, be deducted from the mass of the estate, then, each recipient would pay only a proportion of the amount without reference to his relationship to the deceased. This would result in imposing the tax on the whole personal estate, and ratably distribute the burden among all the beneficiaries. But to reach this the entire classification, grading the rate of the tax by the degrees of relationship, would have to be disregarded. The dilemma, therefore, which is involved in the contention that the statute imposes the tax, not on each legacy or distributive share, but on the whole personalty, is

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this: If the tax is levied and collected according to the classifications in the statute, it is clearly on the legacy or distributive share. If, on the contrary, it is levied on the entire personal estate, then the classifications of the statute must be ignored and the construction be upheld which maintains that the act has classified the rate of tax by the relationship of the beneficiaries to the deceased, and has then disregarded the classification by collecting the tax wholly without reference to such relationship. This construction, besides eliminating a large portion of the text of the act, would do violence to its plain import, which is to make the rate of the tax depend upon the character of the links connecting those taking with the deceased. This is greatly fortified by other portions of the act. At the close of the fifth subdivision of section 29, one of the clauses creating a classification with respect to remote relationship, or want of relationship, to the deceased, it is provided as follows:

“Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty.”

Now, mark, the word is “passing” by will, etc., which excludes a conception that the whole amount of the estate, and not the particular portions thereof which passed, is the subject of the tax. And the exemption, from the tax or duty, of the legacy, etc., given to the husband or wife of a deceased, implies that the scheme of taxation is of the legacies, etc., and not of the whole personal estate. This must be so, unless it can be said that the statute in terms exempts the legacy to a husband or wife from the legacy tax otherwise imposed, although no legacy taxes resulted from the statute.

The provisions for the collection of the tax contained in section 30 of the act confirm the construction that the passing of each legacy or distributive share, and not the entire personal estate of a deceased person, forms the subject of the tax. Thus, before payment and distribution to the legatees, etc., an executor, administrator or trustee is required to pay “the amount of the duty or tax assessed upon such legacy or distributive share,”

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and to "make and render a schedule," etc., in duplicate, "of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon," and the schedule is required to "contain the names of each and every person entitled to any beneficial interest therein."

Whatever be the obscurity it is illumined when the light of the previous legislation, which we have already reviewed, is thrown on it. The passing of legacies and distributive shares were the objects taxed under the English legacy act. They were the subjects taxed under the act of Congress of 1797. By the act of 1862, as we have seen, the whole estate was reached by a probate duty, whilst a distinct duty was charged upon legacies and distributive shares in personal property. When the act of 1864 was enacted there was added a succession tax on real estate, modeled, as said by this court and as shown by the act itself, upon the English Succession Duty Act, which treated each particular gift of real estate as a distinct succession, separately liable for the duty laid by the act. The legacy tax and the succession tax were thus co-related and rested upon the same theory; that is, both considered, they created a tax on the passing of each particular gift or distributive share of both the personal and real estate, treated as separate, one from the other, and each as forming a distinct estate subject to taxation. To assume that, when the succession duty was adopted in 1864, the legacy tax, which was also reënacted in that act, lost its character and became a tax levied, not on the passing of the legacies and distributive shares, but upon the whole amount of the estate before passing, would destroy the entire harmony of the system, and lead to a confession that a confusion of thought existed which cannot in reason be admitted. Indeed, it is difficult to conceive that the act of 1864 contemplated that either the legacy duty or the succession duty which it imposed should be upon the whole estate, since the tax to be paid by the whole estate was therein distinctly and separately provided for by means of the probate duty. If the tax on the whole estate can be, by implication, inserted, the same reasoning would also imply that the succession duty must be likewise treated. It would thus be that the entire act of 1864 would be in force despite its

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repeal and the failure to reënact in the present law either the whole estate or succession duty.

What it was considered the act of 1864 levied the tax on is also in addition demonstrated by the amendments made to the act of 1864 in 1866. One of these amendments was: "That any legacy or share of personal property passing as aforesaid to a minor child of the person who died possessed as aforesaid shall be exempt from taxation under this section, unless such legacy or share shall exceed the sum of one thousand dollars, in which case the excess only above that sum shall be liable to said taxation." Another was that any tax paid under the provisions of sections 124 and 125 of the act of 1864 should "be deducted from the particular legacy or distributive share, on account of which the same is charged." In other words, the act expressly commanded that to be done, which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential.

That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866.

As the only provisions added to the present law relate to the progressive rate upon the legacies, it follows that, unless these added clauses provide for a tax on the whole estate instead of the legacies, it is a demonstration that the whole estate is not taxed by the present act. That the progressive rate features inserted in the act now under review have even no tendency to bring about such a result, we proceed now to demonstrate. We reproduce such portions of section 29 as are essential, putting in

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brackets the words found in the act of 1898 under review, which were not contained in the corresponding provisions existing in the act of 1864:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property where the whole amount of such personal property as aforesaid shall exceed the sum of [ten] thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows, that is to say: [Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:]"

Immediately following this are five classifications of beneficiaries, each varying in rate. These are followed by the progressive rate clause, which is as follows:

["Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half, and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of such property shall exceed the sum of five hundred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of such property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."]

Observing closely the text, it is apparent that the clause

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therein which points out what is taxed is an exact copy of the act of 1864, except the substitution of the "ten" for the word "one." The subject taxed, therefore, under the present act is the same which was taxed under the act of 1864. This is the equivalent of a mathematical certainty. Coming, then, to the added provision at the end of the first paragraph, it says: "Where the whole amount of said personal property shall exceed in value," etc. This, however, creates no new object of taxation, but simply provides that where said personal property, that is, the property previously specified, exceeds a certain amount, a given rate shall be imposed. So, in the further addition, pointing out the progressive feature, the law says, "Where the amount or value of said property shall exceed the sum of," etc., thus clearly again referring to the objects of taxation, the property described in the first part of the act, which was identically the same thing described in the act of 1864. The demonstration, therefore, is conclusive that the progressive feature clause added in the present act creates no new subject of taxation; it simply provides for the progressive rates on the said property mentioned in the opening sentences, which is described exactly as it was in the act of 1864. Now, as the act of 1864 taxed, not the whole estate, but each particular legacy or distributive share, the conclusion cannot be escaped that the present law does the same thing, except that there is added thereto a progressive rate.

The tax being then on the legacies and distributive shares, the rate primarily being determined by the relation of the legatees or distributees to the estate, does the law command that the progressive rate of tax which it imposes on the legacies or distributive shares shall be measured, not separately by the amount of each particular legacy or distributive share, but by the sum of the whole personal estate? This, as we have said, is the interpretation of the act which was adopted by the assessor in levying the taxes under review, and which was sustained by the court below.

The unsoundness of the construction, that the act measures the rate of tax by the whole estate, is fully shown by what we have already said, for, as under the act of 1864 the legacies and

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distributive shares alone were taxed, and as in reënacting it the exact language was retained, (omitting the separate provisions in the act of 1864, taxing the whole estate by a probate duty and taxing successions,) and as the progressive rates only refer to the object taxed, as provided in the act of 1864, it results that under no reasonable construction can the present act be held to provide for a rate of tax computed on the whole estate. Even, however, if all the previous history be shut out of view, and even if the omission from this act of the whole estate duty which obtained under the act of 1864 be for the moment forgotten, the text of the law, considered alone, would not support the construction that it provides for a tax upon each legacy and distributive share by a rate of tax measured by the whole estate. In order to make this clear we will briefly analyze the text. In doing so, however, we eliminate the attempt made by counsel in argument to show the significance thereof by expressions used in the course of the debate by certain members of the Senate. *Maxwell v. Dow*, 176 U. S. 581, and cases there cited.

The meaning of the act largely turns upon the following words, contained in the opening paragraph of section 29: "Where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing," etc. If these words refer to the whole amount of the estate left by a deceased person, then the words added in the act of 1898, to the end of the paragraph, viz., "where the whole amount of *said* personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be," as stated in five classifications next enumerated, must refer to the same thing. It follows likewise that the progressive rate clause, which says, "where the amount or value of *said* property shall exceed the sum of," etc., must relate to the same thing; that is, the whole amount of the estate, as stated in the opening sentences of section 29. If this view be correct, then all legacies in an estate of ten thousand dollars are exempt, and all legacies, whatever be their amount, in an estate above ten thousand dollars, have the original rate adjusted according to the classifications, and that rate is in-

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creased progressively by the whole amount of the estate, and not by the amount of the legacy. If, on the other hand, the words "where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars," found in the first sentence of section 29, relate to the whole amount of each legacy, then legacies under ten thousand dollars are not taxable, and those above ten thousand pay the original rate provided in the classifications, and become subject to the progressive increase clause, according to the amount of the legacy, and not by the whole amount of the estate.

But the pivotal words in the first sentence are not simply "the whole amount of such personal property," but the "whole amount of such personal property *as aforesaid*." This can only refer to the preceding part of the sentence, where what is contemplated by the words "*as aforesaid*" is and can alone be "*any legacies or distributive shares arising from personal property . . . passing after the passage of this act.*" In other words, the statute itself by the reference clause establishes that the whole amount referred to is the sum or value of each particular legacy, etc., separately considered, passing from the deceased to the taker thereof. And this construction of the vital words referred to, derived from what immediately precedes them, is sustained by what immediately follows them, that is, the clause imposing the tax on "any personal property or interest therein, transferred by deed," etc., "made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons," etc. This latter clause treats each item of property given in contemplation of death otherwise than by last will and testament, as a distinct entity to be considered for the purpose of levying the tax. Each of such items, therefore, separately considered, becomes for the purpose of the tax, the whole amount of such personal property, the statute clearly recognizing that there may be partial and distinct interests in each item of personal property, such as an interest for life in one person with a remainder in another. Thus by the two clauses, which are linked together by the words "the whole amount of such personal property," it develops that the amount referred to is the separate and distinct

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sums or items of personal property passing, and not the whole amount of the entire estate, which, as has been shown in considering the previous proposition, the act did not purport to tax as such.

The subsequent provisions of the act lend cogency to this view. Thus, in section 30, it is made the duty of the executor, etc., to pay over to the collector "the amount of the duty or tax assessed upon *such* legacy or distributive share," and he is also commanded to deliver to the collector a schedule "of the amount of *such* legacy or distributive share, together with the amount of the duty which has accrued or shall accrue thereon."

At the risk of repetition, we recur again to a particular feature in the prior legislation, because it very pertinently points out the error which has given rise to the assumption that the "whole personal estate as aforesaid" meant in the act of 1864, or means in this act, the whole amount of the personal estate left by the deceased, and not the whole amount of each legacy considered as a separate estate for the purpose of taxation. Attention has been called to the fact that, in accordance with the English system, the act of 1864 engrafted on the provisions of the act of 1862 a succession or real estate inheritance tax. In doing so, it was unequivocally declared in the law that each separate gift of real property was a distinct succession or estate. In other words, the statute itself announced the rule that the whole amount of each estate subject to taxation, under the succession tax, was the whole amount of each separate item of gift treated as an estate for the purpose of the levy and collection of the taxes thereon. How, then, can it be supposed that the act of 1864 contemplated that the section relating to the legacy should have one meaning, whilst the whole amount of the estate in the sections relating to succession or real estate taxes should have another? Must it not be considered that the statute provided for no such discordant and unjust discrimination, but that, on the contrary, it harmoniously expressed the rule obtaining from the beginning, that is, the levy of a legacy tax on personal estate passing by death to each particular beneficiary treated separately as the amount subject to taxation and the same rule applied to the succession tax by treating each

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item of real estate as the whole amount of an estate passing separately for the purpose of taxation?

It is true that in the practical execution of the act of 1864 the words "the whole amount of such personal property . . . shall exceed the sum of one thousand dollars" were administratively construed as applying to the entire personal estate left by one deceased, and not to the distinct legacies or interests. It resulted that where an estate did not equal one thousand dollars, no tax was collected upon legacies or distributive shares therein, and where the estate exceeded one thousand dollars all legacies and distributive shares, whatever the amount of each, were taxed. Any force resulting from this administrative view, however, is weakened by the fact that the contrary construction prevailed as to the other portions of the act of 1864, the succession duty, where the amount of the tax was determined by the amount or value of each particular item of real property. The administrative construction therefore of the act of 1864 was contradictory, since it enforced one rule on the one hand and an absolutely conflicting one on the other. Besides, the whole estate was taxed as such by the probate duty found in the act of 1864.

As we have said, the act of 1864 was repealed in 1870. 16 Stat. 256. After the repeal, the court was called upon, in *Mason v. Sargent*, 104 U. S. 689, to consider whether, when one who held a life estate in a legacy died subsequent to the repeal of the act, the interest of the legatees in remainder was subject to the inheritance tax. In passing upon this question this court said (p. 690):

"The tax in question was imposed by sec. 124 of the act of June 30, 1864, c. 173, (13 Stat. 223, 285,) upon legacies or distributive shares of personal property exceeding the sum of \$1000, passing, after the passage of the act, from a decedent, either testate or intestate, in the hands of an executor, administrator or trustee, varying in rate, as the party beneficially entitled was less or more remote in consanguinity, or a stranger in blood, to the person from whom it passed; with a proviso that legacies or distributive interests in intestate estates, passing to husband or wife, should be exempt from such tax."

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The opinion thus expressed is in conflict with the assumption that the whole estate contemplated, not each legacy or distributive share, but the entire amount of personal property of the deceased, and this construction may be well considered to have been in effect adopted by the reenactment of the act of 1864, without any change indicating an intention to the contrary.

Granting, however, that there is doubt as to the construction, in view of the consequences which must result from adopting the theory that the act taxes each separate legacy by a rate determined, not by the amount of the legacy, but by the amount of the whole personal estate left by the deceased, we should be compelled to solve the doubt against the interpretation relied on. The principle on which such construction rests was thus defended in argument. The tax is on each separate legacy or distributive share, but the rate is measured by the whole estate. In other words, the construction proceeds upon the assumption that Congress intended to tax the separate legacies, not by their own value, but by that of a wholly distinct and separate thing. But this is equivalent to saying that the principle underlying the asserted interpretation is that the house of A, which is only worth one thousand dollars, may be taxed, but that the rate of the tax is to be determined by attributing to A's house the value of B's house, which may be worth a hundredfold the amount. The gross inequalities which must inevitably result from the admission of this theory are readily illustrated. Thus, a person dying, and leaving an estate of \$10,500, bequeaths to a hospital ten thousand dollars. The rate of tax would be five per cent, and the amount of tax five hundred dollars. Another person dies at the same time, leaves an estate of one million dollars, and bequeaths ten thousand dollars to the same institution. The rate of tax would be $12\frac{1}{2}$ per cent, and the amount of the tax \$1250. It would thus come to pass that the same person, occupying the same relation, and taking in the same character, two equal sums from two different persons, would pay in the one case more than twice the tax that he would in the other. In the arguments of counsel tables are found which show how inevitable and profound are the inequalities which the construc-

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tion must produce. Clear as is the demonstration which they make, they only serve to multiply instances afforded by the one example which we have just given.

We are, therefore, bound to give heed to the rule, that where a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute. *Bate Refrigerating Co. v. Sulzeberger*, 157 U. S. 1, 37; *Wilson v. Rousseau*, 4 How. 646, 680; *Bloomer v. McQuewan*, 14 How. 539, 553; *Blake v. National Banks*, 23 Wall. 307, 320; *United States v. Kirby*, 7 Wall. 482, 486. Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation.

It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems. On this question, however, in any of its aspects, we do not even intimate an opinion, as no occasion for doing so exists, since, as we understand the law, we are clearly of opinion that it does not sustain the construction which was placed on it by the court below.

By elimination, the process of reasoning which we have resorted to in order to demonstrate the unsoundness of the two first contentions as to the meaning of the statute renders it unnecessary to say anything in elaboration of the significance of the statute as embodied in the third proposition, which is, that the tax is on the legacies and distributive shares, the rate being primarily determined by the classifications and being progres-

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sively increased according to the amount of the legacies or shares. Its correctness is at once apparent when the other views are disposed of. As the "whole amount of such personal property as aforesaid" relates to the sum of each legacy or distributive share considered separately, it follows that all legacies not exceeding ten thousand dollars are not taxed, and that those above that amount are taxed primarily by the degree of relationship or absence thereof, specified in the five classifications contained in the statute, and that the rate of tax is progressively increased by the amount of each separate legacy or distributive share. This being the correct interpretation of the statute, it follows that the court below erroneously maintained a contrary construction, and, therefore, the tax assessed and collected was for a larger amount than the sum actually due by law.

The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes. Of course, they concern the passing of property by death, for if there was no property to transmit, there would be nothing upon which the tax levied on the occasion of death could be computed. This legislative and administrative view of such taxes has been directly upheld by this court. In *Scholey v. Rew*, 23 Wall. 331, 349, to which we have heretofore referred, the question presented was the constitutionality of the provisions of the act of 1864, imposing a succession duty as to real estate. The assertion was that the duty was repugnant to the Constitution, because it was a direct tax and had not been apportioned. The tax was decided to be constitutional. The court said (p. 346):

"But it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of

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these provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare.

* * * * *

“Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income, which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.”

This is decisive against the contrary contention here relied on, unless it be that the decision in *Scholey v. Rew* has been overruled, and therefore is no longer controlling.

The argument is that the decision in *Scholey v. Rew* was overruled in *Pollock v. Farmers' Loan & Trust Company*, 157 U. S. 429; 158 U. S. 601. This contention is thus supported in argument.

As in the course of the opinion in *Scholey v. Rew* the court said that taxes on successions could not be distinguished in principle from an income tax, therefore the decision in the *Pollock* case, which held that an income tax was direct, it is argued, necessarily decided that an inheritance tax was also direct. But in the *Pollock* case the decision in *Scholey v. Rew* was not overruled. On the contrary, the correctness of the decision in the latter case as to the particular matter which it actually decided in effect was reaffirmed. In consequence of the statement made in *Scholey v. Rew*, that an income tax and a succession tax could not be distinguished one from the other, that case was relied on in the *Pollock* case by counsel in argument and by the members of the court who dissented, as establishing, for the reason stated, that the income tax was not direct. The court, however, treated *Scholey v. Rew* as inapplicable to an income tax, because it considered that whether an income tax was direct was not actually involved in the latter case, and hence the illustration which was used in *Scholey v. Rew* as to

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an income tax was held not to have been a decision on the question of whether or not an income tax was direct.

The court said (157 U. S. 577):

"*Scholey v. Rew*, 23 Wall. 331, was the case of a succession tax, which the court held to be 'plainly an excise tax or duty' upon the devolution of the estate or the right to become beneficially entitled to the same, or the income thereof, in possession or expectancy. It was like the succession tax of a State, held constitutional in *Mager v. Grima*, 8 How. 490; and the distinction between the power of a State and the power of the United States to regulate the succession of property was not referred to, and does not appear to have been in the mind of the court. The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but on the actual benefit derived by the individual, determined as prescribed. *In re Elwes*, 3 H. & N. 719; *Attorney General v. Sefton*, 2 H. & C. 362; *S. C.* (H. L.) 3 H. & C. 1023; 11 H. L. Cas. 257."

The argument now made, therefore, comes to this: Although in the *Pollock* case the doctrine which the court considered as having been actually decided in *Scholey v. Rew* was not overruled, nevertheless, because an example which was made use of in the course of the opinion in *Scholey v. Rew* was disregarded, the *Pollock* case therefore overruled *Scholey v. Rew*. The issue presented in the *Pollock* case was whether an income tax was direct within the meaning of the Constitution. The contentions which the case involved were thus presented. On the one hand, it was argued that only capitation taxes and taxes on land as such were direct, within the meaning of the Constitution, considered as a matter of first impression, and that previous adjudications had construed the Constitution as having that import. On the other hand, it was asserted that, in principle, direct taxes, in the constitutional sense, embraced not only taxes on land and capitation taxes, but all burdens laid on real or personal property because of its ownership, which were equivalent to a direct tax on such property, and it was affirmed that the pre-

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vicious adjudications of this court had settled nothing to the contrary. The issues which were thus presented in the *Pollock* case, it will be observed, had been expressly reserved in *Scholey v. Rew*, where it was said (23 Wall. 346):

“Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land, is a question not absolutely decided, nor is it necessary to determine it in the present case.”

The question which was thus reserved in *Scholey v. Rew*, and which was presented for decision in the *Pollock* case, was decided in the latter case, the court holding that taxes on the income of real and personal property were the legal equivalent of a direct levy on the property from which the income was derived, and therefore required apportionment. But there was no intimation in the *Pollock* case that inheritance taxes—which had been held in *Scholey v. Rew* not to be direct, which had from all time been considered as being imposed not on property, real or personal, as ordinarily understood, but as being levied on the transmission or receipt of property occasioned by death, and which had from the foundation of the government been treated as a duty or excise—were direct taxes within the meaning of the Constitution. Undoubtedly, in the course of the opinion in the *Pollock* case, it was said that, if a tax was direct within the constitutional sense, the mere erroneous qualification of it as an excise or duty would not take it out of the constitutional requirement as to apportionment. But this language related to the subject-matter under consideration, and was but a statement that a tax which was in itself direct, because imposed upon property solely by reason of its ownership, could not be changed by affixing to it the qualification of excise or duty. Here we are asked to decide that a tax is a direct tax on property which has at all times been considered as the antithesis of such a tax; that is, has ever been treated as a duty or excise, because of the particular occasion which gives rise to its levy.

But it is asserted that it was decided in the income tax cases that, in order to determine whether a tax be direct within the meaning of the Constitution, it must be ascertained whether the

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one upon whom by law the burden of paying it is first cast, can thereafter shift it to another person. If he cannot, the tax would then be direct in the constitutional sense, and, hence, however obvious in other respects it might be a duty, impost or excise, it cannot be levied by the rule of uniformity and must be apportioned. From this assumed premise it is argued that death duties cannot be shifted from the one on whom they are first cast by law, and therefore they are direct taxes requiring apportionment.

The fallacy is in the premise. It is true that in the income tax cases the theory of certain economists by which direct and indirect taxes are classified with reference to the ability to shift the same was adverted to. But this disputable theory was not the basis of the conclusion of the court. The constitutional meaning of the word direct was the matter decided. Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was the legal equivalent of a direct tax on the property from which said income was derived, and hence must be apportioned. These conclusions, however, lend no support to the contention that it was decided that duties, imposts and excises which are not the essential equivalent of a tax on property generally, real or personal, solely because of its ownership, must be converted into direct taxes, because it is conceived that it would be demonstrated by a close analysis that they could not be shifted from the person upon whom they first fall. The proposition now relied upon was considered and refuted in *Nicol v. Ames*, 173 U. S. 509, 515, where the court said:

“The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United

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States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

“In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economic or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity a tax should be regarded in its actual, practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.”

Concluding, then, that the tax under consideration is not direct within the meaning of the Constitution, but, on the contrary, is a duty or excise, we are brought to consider the question of uniformity.

The contention is that because the statute exempts legacies and distributive shares in personal property below ten thousand dollars, because it classifies the rate of tax according to the relationship or absence of the relationship of the taker to the deceased, and provides for a rate progressing by the amount of the legacy or share, therefore the tax is repugnant to that portion of the first clause of section 8 of article 1 of the Constitu-

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tion, which provides "the duties, imposts and excises shall be uniform throughout the United States."

The argument to the contrary, whilst conceding that the tax devised by the statute does not fulfill the requirement of equality and uniformity, as those words are construed when found in state constitutions, asserts that it does not thereby follow that the taxes in question are repugnant to the Constitution of the United States, since the provision in the Constitution, that "duties, imposts and excises shall be uniform throughout the United States," it is insisted has a different meaning from the expression equal and uniform, found in state constitutions. In order to decide these respective contentions it becomes at the outset necessary to accurately define the theories upon which they rest.

On the one side, the proposition is that the command that duties, imposts and excises shall be uniform throughout the United States relates to the inherent and intrinsic character of the tax; that it contemplates the operation of the tax upon the property of the individual taxpayer, and exacts that when an impost, duty or excise is levied, it shall operate precisely in the same manner upon all individuals; that is to say, the proposition is that "uniform throughout the United States" commands that excises, duties and imposts, when levied, shall be equal and uniform in their operation upon persons and property in the sense of the meaning of the words equal and uniform, as now found in the constitutions of most of the States of the Union. The contrary construction is this: That the words "uniform throughout the United States" do not relate to the inherent character of the tax as respects its operation on individuals, but simply requires that whatever plan or method Congress adopts for laying the tax in question, the same plan and the same method must be made operative throughout the United States; that is to say, that wherever a subject is taxed anywhere, the same must be taxed everywhere throughout the United States, and at the same rate. The two contentions then may be summarized by saying that the one asserts that the Constitution prohibits the levy of any duty, impost or excise which is not intrinsically equal and uniform in its opera-

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tion upon individuals, and the other that the power of Congress in levying the taxes in question is by the terms of the Constitution restrained only by the requirement that such taxes be geographically uniform.

The argument as to intrinsic uniformity is asserted to find support in expressions used by some of the Justices in the carriage tax case, *Hylton v. United States*, 3 Dall. 171. The statements thus referred to are as follows:

Mr. Justice Paterson said (p. 180):

"Apportionment is an operation on States, and involves valuations and assessments, which are arbitrary, and should not be resorted to but in case of necessity. Uniformity is an instant operation on individuals, without the intervention of assessments, or any regard to States, and is at once easy, certain and efficacious."

Mr. Justice Iredell said (p. 181):

"If it can be considered as a tax, neither direct within the meaning of the Constitution, nor comprehended within the term duty, impost or excise, there is no provision in the Constitution, one way or another, and then it must be left to such an operation of the power, as if the authority to lay taxes had been given generally in all instances, without saying whether they should be apportioned or uniform; and in that case, I should presume, the tax ought to be uniform, because the present Constitution was particularly intended to affect individuals, and not States, except in particular cases specified. And this is the leading distinction between the Articles of Confederation and the present Constitution."

And the following passage from the opinion in *United States v. Singer*, 15 Wall. 111, 121, is also asserted to support the contention that a tax was imposed upon a distiller, in the nature of an excise, and the question arose whether in its imposition upon different distillers the uniformity of the tax was preserved, and the court said:

"The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they

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shall be uniform throughout the United States. The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits, wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike."

In opposition to this view it is urged that the language used by the Judges in the *Hylton* case was not intended to and does not, when properly understood, refer to the inherent character of the tax, but simply called attention to the fact that, differing from the Articles of Confederation, power was given to Congress by the Constitution to levy duties, imposts and excises, thus acting upon individuals; and that the language in the *Singer* case, whilst it uses the word equal, clearly referred, not to an inherent uniformity, but to a geographical one. And this, it is argued, is rendered certain by the opinion in the *Head Money cases*, 112 U. S. 580, 594, where, in considering the objection that a tax imposed upon the owners of steam vessels for each passenger landed at New York from a foreign port, was void because not levied by any rule of uniformity, the court, speaking by Justice Miller, said:

"The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case, which, as far as it can be called a tax, is an excise duty on the business of bringing passengers from foreign countries into this by ocean navigation, is uniform, and operates precisely alike in every port of the United States, where such passengers can be landed."

To overcome the construction in favor of geographical uniformity asserted by the government to arise from the language just quoted, it is, in the first place, argued that when correctly understood, it does not sustain the claim so based on it, and in the second place, that if it does, it is not binding as authority, because the *Head Money cases* involved, not the uniformity clause of the Constitution, but that portion of clause 6 of section 9 of article 1 of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

It is conceded that if the preference clause just referred to

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and the uniform clause have the same meaning, that of course merely a geographical operation was intended. But it is insisted that the two clauses are distinct in import, and that the difference in language of the two manifests the distinct meanings which should be affixed to them. It is apparent that the controversy cannot be disposed of by a mere reference to prior adjudications, since reliance is, by both sides, in effect, placed upon the same decisions. But to determine which view of the cited authorities is the correct one, it will become necessary not only to analyze the facts which were at issue in the decided cases, but also to elucidate the language of the opinions which have given rise to the conflicting constructions now placed upon such language, by an examination of the subjects to which the language related. As to do this calls for a critical consideration of the provisions of the Constitution referred to in the opinions relied on, we shall, for the moment, put the cases referred to out of mind, and consider the controversy presented as one of original impression. We are, moreover, impelled to this course from the fact that as the word "uniform," or the words "equal and uniform," are now generally found in state constitutions, and as there contained have been with practical unanimity interpreted by state courts as applying to the intrinsic nature of the tax and its operation upon individuals, if it be that the words "uniform throughout the United States," as contained in the Constitution of the United States, have a different significance, the reason for such conclusion should be carefully and accurately stated.

Considering the text, it is apparent that if the word "uniform" means "equal and uniform" in the sense now asserted by the opponents of the tax, the words "throughout the United States" are deprived of all real significance, and sustaining the contention must hence lead to a disregard of the elementary canon of construction which requires that effect be given to each word of the Constitution.

Taking a wider view, it is to be remembered that the power to tax contained in section 8 of article 1 is to lay and collect "taxes, duties, imposts and excises. . . . But all duties, imposts and excises shall be uniform throughout the United

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States." Thus, the qualification of uniformity is imposed, not upon all taxes which the Constitution authorizes, but only on duties, imposts and excises. The conclusion that inherent equality and uniformity is contemplated involves, therefore, the proposition that the rule of intrinsic uniformity is applied by the Constitution to taxation by means of duties, imposts and excises, and it is not applicable to any other form of taxes. It cannot be doubted that in levying direct taxes, after apportioning the amount among the several States, as provided in clause 4 of section 9 of article 1 of the Constitution, Congress has the power to choose the objects of direct taxation, and to levy the quota as apportioned directly upon the objects so selected. Even then, if the view of inherent uniformity be the true one, none of the taxes so levied would be subjected to such rule, as the requirement only relates to duties, imposts and excises.

But the classes of taxes termed duties, imposts and excises, to which the rule of uniformity applies, are those to which the principle of equality and uniformity in the sense claimed, is in the nature of things the least applicable and least susceptible of being enforced. Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned. Impost duties take every conceivable form, as may by the legislative authority be deemed best for the general welfare. They have been at all times often specific. They have sometimes been discriminatory, particularly when deemed necessary by reason of the tariff legislation of other countries. The claim of intrinsic uniformity, therefore, imputes to the framers a restriction as to certain forms of taxes, where the restraint was least appropriate and the omission where it was most needed. This discord which the construction, if well founded, would create, suggests at once the unsoundness of the proposition, and gives rise to the inference that the contrary view by which the unity of the provisions of the Constitution is maintained, must be the correct one. In fact, it is apparent that if imposts, duties and excises are controlled by the rule of intrinsic uniformity, the methods usually employed at the time of the adoption of the

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Constitution in all countries in the levy of such taxes would have to be abandoned in this country, and, therefore, whilst nominally having the authority to impose taxes of this character, the power to do so would be virtually denied to Congress.

Now, that the requirement that direct taxes should be apportioned among the several States, contemplated the protection of the States, to prevent their being called upon to contribute more than was deemed their due share of the burden, is clear. Giving to the term uniformity as applied to duties, imposts and excises a geographical significance, likewise causes that provision to look to the forbidding of discrimination as between the States, by the levying of duties, imposts or excises upon a particular subject in one State and a different duty, impost or excise on the same subject in another; and therefore, as far as may be, is a restriction in the same direction and in harmony with the requirement of apportionment of direct taxes. And the conclusion that the possible discrimination against one or more States was the only thing intended to be provided for by the rule which uniformity imposed upon the power to levy duties, imposts and excises, is greatly strengthened by considering the state of the law in the mother country and in the colonies, and the practice of taxation which obtained at or about the time of the adoption of the Constitution.

In England, nowhere had the conception of a limitation on the power to levy duties, imposts and excises by an intrinsic rule of uniformity found utterance, and the practice which had obtained, it may be said, was commonly to the contrary. Passing without special notice the system of customs (import and export) duties existing in England from a time long prior to the Revolution, which was replete with examples of taxation not fulfilling the requirement of intrinsic equality and uniformity, we briefly refer to a few examples of the same nature afforded by statutes imposing internal taxation in the mother country.

Internal taxation, in the form of excises, was introduced into England by a Parliamentary resolution passed on March 28, 1643, and carried into effect by an ordinance of the same date. 2 Dowell, *History of Taxation*, 9. Many of these excises were imposed with reference to the supposed ability of the

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party whose property, office, etc., was assessed to pay the same. Thus, in 1747, a duty of excise was imposed upon coaches and other carriages kept for personal use. 20 Geo. II, ch. 10; 7 Stat. 15. In 1756 a duty of excise was imposed upon the possessor of plate over a certain weight. 29 Geo. II, ch. 14; 7 Stat. 661. In 1758 all offices of profit, other than naval and military, were subjected to the payment of duty *when the salary exceeded one hundred pounds*. 31 Geo. II 1257, 8 Stat. 212 ch. 22. In 1777 a duty was imposed upon employers of coachmen and other men servants. 17 Geo. III, ch. 39; 13 Stat. 103. In 1779 a duty was imposed, not upon all forms of locomotion, but upon traveling by post, the usual method of locomotion among the wealthier classes. 19 Geo. III, ch. 51; 13 Stat. 414. In 1784 a duty was laid, not uniformly with respect to all horses kept by a person, but in respect to horses kept for the saddle or driving in carriages. 24 Geo. III, ch. 31; 14 Stat. 496.

It is accurate to say that in the colonies prior to the Confederation, and in the States prior to the time of the adoption of the Constitution, the wisdom of restraining the levy of duties, imposts and excises by an express requirement of inherent equality and uniformity had likewise nowhere found expression. The state constitutions of the revolutionary period (except, perhaps, those of Massachusetts and New Hampshire) contained no provisions indicating an intent to control the bodies authorized to levy taxes and raise money in the exercise of a sound discretion as to the mode to be adopted in levying taxation. The people were content to commit to their representatives the enactment of reasonable and wholesome laws, being satisfied with the protection afforded by a representative and free government and by the general principles of the common law protecting the inalienable rights of life, liberty and property.

The Massachusetts constitution of 1780 and that of 1788 of New Hampshire merely required that the assessments of rates and taxes should be proportional and reasonable and with a view to equality, but there was no such qualification expressed as to the authority conferred "to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise

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and commodities whatsoever, brought into, produced, manufactured or being within the same."

In taxing laws of the original States prior to the Convention of 1787, exemptions were allowed from a consideration of what was deemed best for the general welfare, and taxes were frequently laid from a consideration of the presumed ability of the owner to pay the tax. Discriminations and exemptions were also contained in various state taxing laws, which illustrate the discretion vested in the legislative bodies of the States in the latter part of the eighteenth century. We print in the margin a few examples.¹

¹In chapter 5 of the Pennsylvania Statutes, of March 27, 1782, a tax was laid upon "Negro and mulatto servants above the age of twelve years; horses, mares and cattle, above three years old; coaches and carriages kept by any person for his or her own use, and for the purpose of traveling or pleasure." The chaises or riding chairs of ministers of the gospel, the president, professors or tutors of Harvard College, or grammar school masters, were exempt from duty of excises laid upon certain described coaches and other carriages, by an act passed in Massachusetts on July 10, 1783.

In a law of 1784, at page 131, of the Laws of Connecticut, the listers were required in the list of polls and ratable assets of the inhabitants of the respective counties to list polls from 21 to 70 years of age at eighteen pounds, and polls from 16 to 21 years old at nine pounds; houses were to be listed, not uniformly, but according to the number of fireplaces; attorneys at law and physicians and surgeons were to be listed, the least practitioner at a certain sum, and larger practitioners higher in proportion; shopkeepers or traders, the lowest class at twenty-five pounds, and all others in due proportion; and each allowed and licensed tavern keeper was to be set at fifteen pounds, and to be added to in proportion to their situation and profits, according to the best judgment of the listers; and persons following any "mechanical art or mystery, such as blacksmiths, shoemakers, tanners, goldsmiths, or silversmiths," and all other works and occupations followed or pursued by any persons by which profits arise, except business in any public office, husbandry and common labor for hire, were to be assessed by the best judgment of the listers.

The general assembly of New Jersey, by the act (ch. 400) December 22, 1783, for the purpose of raising ten thousand pounds for the support of government and the contingent expenses for the year 1784, enumerated a large number of items of persons and articles which were made taxable by the act, to be valued and rated by the assessors within stated sums. Single men who kept a horse were to be rated at not exceeding ten shillings, while single men who did not keep a horse were to be rated at not exceeding five

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It cannot be, therefore, supposed that the framers of the Constitution, in using the words "uniform throughout the United States," contemplated to confer the power to levy duties, imposts and excises, and yet to accompany this grant of authority with a restriction which had never found expression as to such taxes at that time anywhere, and which was contrary to the practice which had uniformly obtained both in the mother country and in the colonies, and in the States prior to the adoption of the Constitution. But, one of the most satisfactory answers to the argument that the uniformity required by the Constitution is the same as the equal and uniform clause which has since been embodied in so many of the state constitutions, results from a review of the practice under the Constitution from the beginning. From the very first Congress down to the present date, in laying duties, imposts and excises, the rule of inherent uniformity, or, in other words, intrinsically equal and uniform taxes, has been disregarded, and the principle of geographical uniformity consistently enforced. Take, for a general example,

shillings. Male slaves were to be taxed at not exceeding five shillings, but it was provided "That no slave is to be taxed who is unable to work, or that may appear to the assessors to be no profit to his master or mistress." Fisheries where fish were caught for sale, and saw mills that sawed timber for sale or hire, were to be rated not exceeding two pounds.

In South Carolina, by an act passed March 28, 1787, 5 Stat. 24, entitled "An act for raising supplies for the year 1787," a tax of nine shillings and four pence was laid upon free negroes and mulattoes from 16 to 50 years of age, while the tax upon free white men was upon those neither lame or disabled, and who were between 21 to 50 years of age, while the tax was to be ten shillings per head. And a tax of one per cent was laid on the profits of faculties and professions, clergymen, schoolmasters and schoolmistresses excepted.

In Delaware, by a law passed in the sixteenth year of the reign of Geo. II (Laws of Delaware, Adams' ed., pub. 1797, p. 257), and apparently in force when the constitution of 1792 was adopted (*Ib.* pp. 396, 429), unsettled tracts and parcels of land were exempted from taxation, and the assessors were directed in assessing persons to have due regard "to such as are poor and have a charge of children," the poorer sort of such not to be rated under eight pounds. Single men without visible estate were to be rated at not less than twelve pounds nor more than twenty-four pounds, exempting, however, single men under twenty-one years of age, and apprentices and such as had not been out of apprenticeship more than six months.

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specific import duties, by which particular specific rates are imposed on enumerated articles, without reference to their value. It is manifest that all such duties are void, if intrinsic equality and uniformity be the rule, and yet in all the great controversies which have arisen over the policy of impost duties generally, and particularly as to the economic wisdom of specific duties, never has it been contended that the power to impose them did not exist because of the uniformity clause of the Constitution. So, also, mention may be made of the common form of the excises on distilled spirits with the tax per gallon without reference to the value thereof.

Indeed, tariff duties have not only varied with different articles, but have varied with the different valuations of the same article. We cite a few instances of the latter character, found in the tariff acts of August 5, 1861, 12 Stat. 293, and August 27, 1894, 28 Stat. 530, respectively. In the act of 1861 a duty was imposed —

“On all silks valued at not over one dollar per square yard, thirty per centum ad valorem; on all silks valued over one dollar per square yard, forty per centum ad valorem; on all silk velvets or velvets of which silk is the component material of chief value, valued at three dollars per square yard or under, thirty per centum ad valorem; valued at over three dollars per square yard, forty per centum ad valorem.”

In the act of 1894 occurs the following paragraph:

“280. On woolen and worsted yarns made wholly or in part of wool, worsted, the hair of the camel, goat, alpaca or other animals, valued at not more than forty cents per pound, thirty per centum ad valorem; valued at more than forty cents per pound, forty per centum ad valorem.”

So also a single paragraph of the tariff acts has frequently contained an elaborate system of minimum classifications and compound duties, as well as exemptions for importations below a certain value. See provisions discussed in *Arthur v. Victor*, 127 U. S. 572, 575; *Hedden v. Robertson*, 151 U. S. 520, 521; *Arthur v. Morgan*, 112 U. S. 495, 498.

Nor can it be said that these illustrations relate to legislation enacted long after the adoption of the Constitution, when by

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lapse of time an erroneous conception as to the meaning of the Constitution had arisen, for the examples to which we have just referred are but types of many forms of taxation by way of duties, imposts and excises which were enacted without question from the very beginning, and have continued in an unbroken line to the present time, sanctioned by the founders of our institutions and approved in practical execution by all the illustrious men who have directed the public destinies of the nation. Excise taxes were largely used during the administration of President Washington, and again during and after the war of 1812. It may properly be said of these excises that none of them were uniform according to the principles now contended for, yet no constitutional question in this regard was ever raised about them. A partial list of some of the earlier acts is inserted in the margin.¹ We do not cite from the later revenue acts,

¹ Federal excises during the first generation after the Constitution.

I. *Washington's administration.*

March 3, 1791, ch. 15, §§ 14, 15, on distilled spirits; not uniform or proportionate to strength. No tax on country distilleries using home made materials.

May 8, 1792, ch. 32, § 1, on distilled spirits; country distillers taxed differently from those in cities, towns and villages; § 11, no drawback on any quantity less than 100 gallons.

June 5, 1794, ch. 45, § 1, on carriages. Contains some exemptions. Discussed in *Hylton v. United States*, 3 Dall. 171.

June 5, 1794, ch. 48, on licenses for making certain sales of wines or foreign distilled spirituous liquors.

June 5, 1794, ch. 51, §§ 1, 2, on snuff and refined sugar; § 14, no drawback on any quantity less than \$12 worth. Discussed in *Pennington v. Coze*, 2 Cranch, 33.

June 9, 1794, ch. 65, § 1, on auction sales; with exemption of judicial sales, sales of goods distrained or in insolvency; and of sales of produce of land, when sold on the land where produced, etc.; and of sales "of any farming utensils, stock or household furniture by persons removing from the place of their former residence, where the amount . . . shall not exceed \$200."

March 3, 1795, ch. 43, § 1, on mortars and pestles, etc., in snuff mills; § 8, no drawback on any exports of snuff less than 300 lbs.

May 28, 1796, ch. 37, § 1, on carriages, with exemptions.

II. *Period of war of 1812.*

July 24, 1813, ch. 21, § 1, on refined sugar.

July 24, 1813, ch. 24, § 1, on carriages, with exemptions.

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because of the numerous and familiar instances of such legislation which abound therein.

The necessities which gave birth to the Constitution, the controversies which preceded its formation, and the conflicts of opinion which were settled by its adoption, may properly be taken into view for the purpose of tracing to its source any particular provision of the Constitution, in order thereby to be enabled to correctly interpret its meaning. *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 558.

The paralysis which the Articles of Confederation produced upon the Continental Congress because of the want of power in that body to enforce necessary taxation to sustain the government needs no more than statement. And the proceedings of the Congress during the Confederation afford abundant evidence of the constant effort which was made to overcome this situation by attempts to obtain authority from the States for Congress to levy the taxes deemed by it essential, and thus relieve it from the embarrassment occasioned by the fact that all demands for revenue depended for fulfillment wholly upon the action of the respective States. Despite the constant agitation as to the subject and the abundant discussions which took place

July 24, 1813, ch. 25, § 1, on licenses for distilling liquors.

July 24, 1813, ch. 26, § 1, on auction sales; $\frac{1}{2}$ of one per cent on sales of vessels; one per cent on other sales of goods, etc., with exemptions.

August 2, 1813, ch. 39, § 4, on licenses for retailing wines, etc.; one rate for cities, towns and villages, another for the country.

August 2, 1813, ch. 53, §§ 1, 2, on bank notes, etc., graduated but not ad valorem; commutable at $1\frac{1}{2}$ per cent on dividends.

December 15, 1814, ch. 12, § 1, on carriages, graduated but not ad valorem.

December 21, 1814, ch. 15, § 1, on distilled spirits.

December 23, 1814, ch. 16, § 1, on auction sales; § 3, on retailers' licenses.

January 18, 1815, ch. 22, § 1, on domestic manufactures. Various specific and ad valorem rates, with exemptions, as umbrellas under \$2, boots under \$5 a pair.

January 18, 1815, ch. 23, § 1, on household furniture kept for use (annual duty) with minimum of \$200, graduated but not ad valorem. The unit is the family; § 13, exemption of books, etc.; § 14, exemption of certain charitable, religious or literary institutions.

February 27, 1815, ch. 61, on plate.

April 19, 1816, ch. 58, § 4, on licenses for distilling liquors.

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in relation to it during the period of the Confederation, in the whole of the proceedings not a word can be found which can give rise to even the suggestion that there was then any thought of restraining the taxing power with reference to the intrinsic operation of a tax upon individuals. On the contrary, the sole and the only question which was ever present and in every form was discussed, was the operation of any taxing power which might be granted to Congress upon the respective States; in other words, the discrimination as regards States which might arise from a greater or lesser proportion of any tax being paid within the geographical limits of a particular State.

The proceedings of the Continental Congress also make it clear that the words "uniform throughout the United States," which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, "to operate generally throughout the United States." The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. We shall, however, make a few references on the subject.

The view that intrinsic uniformity was not then conceived is well shown by remarks by Mr. Wilson upon a proposition submitted by him to the Continental Congress on March 18, 1783, (5 Ell. Deb. 67,) that Congress be empowered to lay and impose "a tax of one quarter of a dollar per hundred acres on all located and surveyed lands within each of the States." He said, speaking of the proposed tax, "that it was more moderate than had been paid before the Revolution, and it could not be supposed the people would grudge to pay, as the price of their liberty, what was formerly paid to their oppressors."

As early as February, 1781, a resolution was proposed authorizing Congress to levy certain taxes and duties, which resolution contained the proviso, "and the same articles shall bear the same duty and impost throughout the said States without exemption." 1 Ib. p. 92.

Though this resolution failed of passage, a report of the committee of the whole was agreed to on the same day, in the form

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of a resolution recommended to the several States to levy for the use of the United States a duty of 5 per cent upon imports, with certain exceptions, and a duty of 5 per cent upon all prizes and prize goods. As late as December, 1782, however, some of the States had failed to comply with this resolution. 5 Ell. Deb. 13.

On January 25, 1783, (5 Ib. 31,) a resolution was proposed declaring that Congress would "make every effort in their power to obtain, from the respective States, *general* and substantial funds adequate to the object of funding the whole debt of the United States;" . . . The word "general" was stricken out, because susceptible of being considered as implying that every object of taxation within the States should be embraced. That is to say, in order to remove any impression that the word "general" might imply the obligation to levy on all articles, the phraseology of the previous resolution was changed so as to cause the word to have merely a geographical significance, viz., to require that whatever subject of taxation was assessed, the same subject should be taxed in every State, or, in other words, that the particular tax should operate generally throughout the United States. Two days later, a new resolution having been introduced declaring it to be the opinion of Congress that *general* funds should be established, to be collected by Congress, the same objection was repeated, (Ib. 34,) and the proposition was amended so as to read "establishment of permanent and adequate funds to operate generally throughout the United States." There being controversy as to whether Congress should be allowed to collect the taxes, (Ib. 34,) the debates record the following proceedings:

"On the motion of Mr. Madison, the whole proposition was new modelled, as follows:

" 'That it is the opinion of Congress that the establishment of permanent and adequate funds, *to operate generally throughout the United States*, is indispensably necessary for doing complete justice to the creditors of the United States, for restoring public credit, and for providing for the future exigencies of the war.'

"The words 'to be collected under the authority of Congress' were, as a separate question, left to be added afterwards."

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Mr. Madison, after commenting on the demerits of the plans just referred to, prefaced his subsequent remarks with the following (Ib. p. 36): "It remains to examine the merits of a plan of general revenue *operating throughout the United States*, under the superintendence of Congress."

On March 11, 1783, (5 Ell. Deb. 64), a vote was taken upon three questions, the first being: "Shall any taxes, *to operate generally throughout the States*, be recommended by Congress, other than duties on foreign commerce?" The matter culminated on April 18, 1783, in the adoption of a resolution by nine States, recommending to the several States that Congress be vested with the power to levy, for the use of the United States, certain duties, as well specific as ad valorem, upon goods imported into the States from any foreign port, island or plantation. (1 Ell. Deb. 93.)

In an address which submitted the resolution to the States it was observed (Ib. 97):

"To render this fund as productive as possible, and, at the same time, to narrow the room for collusions and frauds, it has been judged an improvement of the plan to recommend a liberal duty on such articles as are most susceptible of a tax according to their quantity, and are of most equal and general consumption; leaving all other articles, as heretofore proposed, to be taxed according to their value."

It was also stated in the address that "to bring this essential resource (a tax on imposts) into use . . . a concerted *uniformity* was necessary;" and "that this *uniformity* cannot be concerted through any channel so properly as through Congress."

Thus it is apparent that the expression "uniform throughout the United States" was at that time considered as purely geographical, as being synonymous with the expression "general operation throughout the United States," and that no thought of restricting Congress to intrinsic uniformity obtained, since the powers recommended were absolutely in conflict with such theory.

The reasons advanced by those who opposed the various resolutions to which we have referred are, if anything, more deci-

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sive than are the matters to which we have called attention. Those reasons were predicated upon the inequality among the States which might arise from the granting to Congress the power to lay duties, imposts and excises. That is, if a particular article was levied on generally throughout the various States by an excise or duty, as a greater quantity of that article might be found in one State than in other States, it was asserted the burden would be unequal because the former State would pay a greater proportion of the tax. This form of objection is well illustrated by what was said by Mr. Rutledge and Mr. Lee against the grant of power to Congress to lay duties or excises, to operate generally throughout the United States. We quote from 5 Ell. Deb. p. 34, as follows:

"Mr. Rutledge objected to the term '*generally*,' as implying a degree of *uniformity* in the tax which would render it unequal. He had in view, particularly, a land tax, according to quality, (quantity? See note, p. 37,) as had been proposed by the office of finance.

* * * * *

"Mr. Lee seconded the opposition to the term '*general*.' He contended that the States would never consent to a uniform tax, because it would be unequal."

Again (Ib. p. 37) Mr. Rutledge complained "that those who so strenuously urged the necessity and competency of a general revenue, operating throughout all the United States at the same time, declined specifying any general objects from which such a revenue could be drawn." And the same reason was urged for refusing the authority to lay imposts throughout the United States, as is shown by the objections made, to which we shall now refer. Thus, with respect to duty on imported salt, it was argued that it would bear injuriously on the eastern States "on account of salt consumed in the fisheries, and that besides it would be injurious to the national interest by adding to the cost of fish." 5 Ell. Deb. 61. So, also, Rhode Island protested against the grant of the power to impose duties recommended by the resolution of April 18, 1783, previously referred to, on the ground "that the proposed duty would be unequal in its operation, bearing hardest upon the most commercial States,

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and so would press peculiarly hard upon that State which draws its chief support from commerce." 1 El. Deb. 101. And the nature of this objection caused it to come to pass that in the subsequent discussions in Congress, the claim that it was essential to confer upon Congress the authority to lay duties, imposts and excises to be uniform throughout the United States, became associated in the discussion with the asserted necessity that Congress should have the power to establish uniform regulations of commerce to prevent the discrimination resulting from the laying of duties, imposts and excises by the respective States. 1 Ib. 112. The association of the two subjects evolved by their natural relation is well shown by a resolution of Mr. Madison, introduced in the Virginia house of delegates in 1784, (Ib. 114,) "wherein it was proposed that the delegates from the State of Virginia should be instructed to propose in Congress a recommendation to the States in Union, to authorize that assembly to regulate their trade," on principles and under qualifications stated in the following paragraphs:

"1st. That the United States in Congress assembled be authorized to prohibit vessels belonging to any foreign nation from entering any of the ports thereof, or to impose any duties on such vessels and their cargoes which may be judged necessary; all such prohibitions and duties to be *uniform throughout the United States*, and the proceeds of the latter to be carried into the treasury of the State within which they shall accrue.

"2d. That no State be at liberty to impose duties on any goods, wares or merchandise, imported, by land or by water, from any other State, but may altogether prohibit the importation from any State of any particular species or description of goods, wares or merchandise, of which the importation is at the same time prohibited from all other places whatsoever."

It will be noticed that the words "uniform throughout the United States" are the same which were subsequently adopted in the clause of the Constitution under consideration, and that the term uniformity, in the resolution of Mr. Madison, was applied not only to duties, but to *regulations and prohibitions respecting external commerce*, which were designed to be *the same* all over the Union.

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Though the resolution of Mr. Madison was not adopted, it led to the sending by Virginia of commissioners to Annapolis to meet commissioners from the other States, the result of which meeting was the Federal convention of 1787.

Considering the proceedings of the convention, the same observation is pertinent which we have previously made as to the Continental Congress, viz., that, despite the struggles and controversies which environed the final adoption of the Constitution, not a single word is found in any of the debates, or in any of the proceedings or historical documents cotemporaneous and concurrent with the adoption of the Constitution, which give the slightest intimation that any suggestion was ever made that the grant of power to tax was considered from the point of view of its operation upon the individual. The struggles which were flagrant in the Continental Congress were transferred to the convention. The question of the undue proportion of taxation which might fall upon one or more States if direct taxes were laid was solved by the principle of apportionment of direct taxes, duties, imposts and excises, which were only subjected to the requirement of uniformity throughout the United States, these words, as we have shown, having acquired at that time an unquestioned meaning.

Without going into minute detail, the mention of a few salient particulars will serve to show how the result of the convention brought together the provisions as to the uniformity of duties, imposts and excises throughout the United States and the restriction against discriminating commercial regulations by Congress, just as they had by the force of circumstances been drawn together in the Continental Congress, and how their solution in the Constitution was substantially in accord with the resolution of Mr. Madison, introduced into the Virginia house of delegates, to which we have referred.

The draft of a Federal Constitution, submitted to the convention by Mr. Pinekney, provided in the first and second paragraphs as follows (5 Ell. Deb. 130):

"Art. VI. The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises ;

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"To regulate commerce with all nations and among the several States ;

* * * * *

"The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description ; which number shall, within — years after the first meeting of the legislature, and within the term of every — year after, be taken in the manner to be prescribed by the legislature.

"No tax shall be laid on articles exported from the States ; nor capitation tax, but in proportion to the census before directed."

No other provision was made respecting taxation.

The plan of Mr. Paterson, of New Jersey, provided, in addition to the powers vested in Congress by the Articles of Confederation, (p. 191,) that Congress should be authorized "to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandise of foreign growth or manufacture, imported into any part of the United States ; by stamps on paper, vellum or parchment, and by a postage on all letters and packages passing through the general post office—to be applied to such Federal purposes as they shall deem proper and expedient ; to make rules and regulations for the collection thereof ; and the same from time to time to alter and amend, in such manner as they shall think proper ; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other."

By another section of the Paterson plan, it was provided that whenever requisitions upon the States should be necessary, they should be made by the rule of numbers and not by value of land, as under the Confederation ; and the Congress was to be authorized "to devise and pass acts" directing and authorizing the collection of requisitions when not complied with. It is thus seen that both of the plans referred to made no provision for uniformity of taxation in the sense contended for by the opponents of the tax now under consideration. The committee of detail, in the first section of article VII of their draft of a proposed constitution, reported the two clauses of the plan of Mr. Pinckney first quoted, substituting the word "foreign"

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for the word "all" before the word "nations." 5 Ell. Deb. 378.

On August 25, 1787, the following occurred (Ib. 478):

"Mr. Carroll and Mr. L. Martin expressed their apprehensions, and the probable apprehensions of their constituents, that, under the power of regulating trade, the general legislature might favor the ports of particular States, by requiring vessels destined to or from other States to enter and clear thereat, as vessels belonging or bound to Baltimore, to enter and clear at Norfolk, etc. They moved the following proposition:

"The legislature of the United States shall not oblige vessels belonging to citizens thereof, or to foreigners, to enter or pay duties or imposts in any other State than in that to which they may be bound, or to clear out in any other than the State in which their cargoes may be laden on board; nor shall any privilege or immunity be granted to any vessel on entering or clearing out, *or paying duties or imposts in one State in preference to another.*"

On the same day Mr. McHenry and General Pinckney submitted a proposition (which was referred *nem. con.* to a committee) relating to the establishment of new ports in the States for the collection of duties or imposts, which concluded as follows (p. 479):

"All duties, imposts and excises, prohibitions or restraints, laid or made by the legislature of the United States, *shall be uniform and equal* throughout the United States."

The fourth section of the seventh article of the proposed constitution reported by the committee on detail, on August 6, 1787, read as follows (p. 379):

"SEC. 4. No tax or duty shall be laid by the legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited."

The committee to whom these propositions were referred made a report on August 28, in effect embodying both propositions in one paragraph, as follows (Ib. 483):

"That there be inserted, after the fourth clause of the seventh

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section, 'nor shall any regulation of commerce or revenue *give preference to the ports of one State over those of another*, or oblige vessels bound to or from any State to enter, clear or pay duties, in another; and all *tonnage duties, imposts and excises*, laid by the legislature, *shall be uniform throughout the United States.*'"

It will be noticed that the committee recommended, not merely that preferences between ports should be forbidden by "any regulation of commerce," but also that such preferences should not be made by "any regulation of *revenue*." This, obviously, rendered it unnecessary to include, in the latter part of the clause, "prohibitions or restraints," as proposed by Mr. McHenry and General Pinckney. The substantial effect of the first clause of the paragraph was to require that all regulations of commerce *or of revenue* affecting commerce through the ports of the States should be the same in all ports.

It follows from the collocation of the two clauses that the prohibition as to preferences in regulations of commerce between ports and the uniformity as to duties, imposts and excises, though couched in different language, had absolutely the same significance. The sense in which the word "uniform" was used is shown by the fact that the committee, whilst adopting in a large measure the proposition of Mr. McHenry and General Pinckney, "that all duties, imposts, excises, prohibitions or restraints . . . shall be uniform and equal throughout the United States," struck out the words "and equal." Undoubtedly this was done to prevent the implication that taxes should have an equal effect in each State. As we have seen, the pith of the controversy during the Confederation was that even, although the same duty or the same impost or the same excise was laid all over the United States, it might operate unequally by reason of the unequal distribution or existence of the article taxed among the respective States.

On August 31, 1797, the report of the committee was acted upon as follows (5 Ell. Deb. 502): The provision, "Nor shall any regulation of commerce or revenue give preference to the ports of one State over those of another," was adopted *nem. con.* After discussion the clause, "or oblige vessels bound to or from

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any State to enter, clear or pay duties in another," was agreed to. Quoting from the debates at page 503:

"The word 'tonnage' was struck out *nem. con.*, as comprehended in 'duties.'

"On the question on the clause of the report—'and all duties, imposts and excises, laid by the legislature, shall be uniform throughout the United States'—it was agreed to *nem. con.*"

In a foot-note, it is said:

"In the printed journal, New Hampshire and South Carolina entered in the negative."

On September 4, 1787, the committee to whom sundry resolutions, etc., had been referred on August 31, recommended, among others, the following addition and alteration to the report before the convention (pp. 506 to 507):

"1. The first clause of article 7, section 1, to read as follows: 'The legislature shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States.'

"2. At the end of the second clause of article 7, section 1, add, 'and with the Indian tribes.'"

The committee on style, on September 12, 1787, reported a plan of the Constitution, (p. 535,) the foregoing provision conferring authority to lay taxes, etc., being designated as section 8 of article 1.

On September 14, 1783, the words "But all such duties, imposts and excises shall be uniform throughout the United States," which, in their adoption had been associated with and formed but a part of the clause forbidding a preference in favor of the port of one State over the port of another State—in other words, had been a part of another clause—were shifted, by a unanimous vote, from that paragraph, and were annexed to the provisions granting the power to tax.

Thus, it came to pass that although the provisions as to preference between ports and that regarding uniformity of duties, imposts and excises were one in purpose, one in their adoption, they became separated only in arranging the Constitution for the purpose of style. The first now stands in the Constitution as a part of the sixth clause of section 7 of article 1, and the

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other is a part of the first clause of section 8 of article 1. By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words "uniform throughout the United States" do not signify an intrinsic but simply a geographical uniformity. And it also results that the assertion to which we at the outset referred, that the decision in the *Head Money cases*, holding that the word uniform must be interpreted in a geographical sense, was not authoritative, because that case in reality solely involved the clause of the Constitution forbidding preferences between ports, is shown to be unsound, since the preference clause of the Constitution and the uniformity clause were, in effect, in framing the Constitution, treated, as respected their operation, as one and the same thing, and embodied the same conception.

We add that those who opposed the ratification of the Constitution clearly understood that the uniformity clause as to taxation imported but a geographical uniformity, and made that fact a distinct ground of complaint. Thus in the report made to the legislature of Maryland by Luther Martin, attorney general of the State, detailing and commenting upon the proceedings of the convention of 1787, of which convention Mr. Martin was a delegate, in the course of comments upon the tax clause of the Constitution Mr. Martin said (1 Ib. p. 369):

"Though there is a provision that all duties, imposts and excises shall be uniform—that is, *to be laid to the same amount on the same articles in each State*—yet this will not prevent Congress from having it in their power to cause them to fall very unequally and much heavier on some States than on others, because these duties may be laid on articles but little or not at all used in some other States, and of absolute necessity for the use and consumption in others; in which case, the first would pay little or no part of the revenue arising therefrom, while the whole or nearly the whole of it would be paid by the last, to wit, the States which use and consume the articles on which imposts and excises are laid."

Having disposed of the question of uniformity, we are next brought to consider certain contentions which relate to that subject. It is argued that even although it be conceded that

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the uniformity required by the Constitution is only a geographical one, the particular law in question does not fulfill the requirements of even geographical uniformity, since it does not apply to the District of Columbia. We think this contention is without merit.

The proposition is predicated upon the fact that the statute purports to lay the tax upon legacies and distributive shares "passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory;" and provides that the receipt for the tax will entitle an administrator, etc., to credit to the amount of the payment made to the collector "by any tribunal which, by the laws of any State or Territory, is, or may be, empowered to decide and settle the accounts of executors and administrators."

This, it is asserted, does not embrace the District of Columbia. Without attempting to determine whether the necessary construction of the statute would require the inclusion of the District of Columbia within its terms, aside from any special provision bearing upon the question, we think the provisions of section 31 of the act makes the objection untenable. That section provides as follows (30 Stat. 466):

"SEC. 31. That all administrative, special or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed, are hereby made applicable to this act."

The result of this provision is to carry into the law under review the provisions of section 3140 of the Revised Statutes, relating to internal revenue laws generally. It is as follows:

"3140. The word 'State,' when used in this title, shall be construed to include the Territories and the District of Columbia, where such construction is necessary to carry out its provisions."

It is yet further asserted that the tax does not fulfill the requirements of geographical uniformity, for the following reason: As the primary rate of taxation depends upon the degree of relationship or want of relationship to a deceased person, it is argued that it cannot operate with geographical uniformity, inasmuch as testamentary and intestacy laws may differ in every

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State. It is certain that the same degree of relationship or want of relationship to the deceased, wherever existing, is levied on at the same rate throughout the United States. The tax is hence uniform throughout the United States, despite the fact that different conditions among the States may obtain as to the objects upon which the tax is levied. The proposition in substance assumes that the objects taxed by duties, imposts and excises must be found in uniform quantities and conditions in the respective States, otherwise the tax levied on them will not be uniform throughout the United States. But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, not that in order to levy such a tax objects must be selected which exist uniformly in the several States. Indeed, the contention was substantially disposed of in the *License Tax cases*, 5 Wall. 472, previously referred to. It was there urged that, as the several States had the right to forbid the carrying on of the liquor traffic, therefore Congress had no power to license such traffic, because it would interfere with the authority of the State. It was held that the license was validly imposed, that it did not interfere with the power of the States to prevent the liquor traffic, because in a State where such traffic was forbidden the license would be inoperative; but in the States where such traffic was allowed, the license would be effective. The argument, however, is additionally fully answered by the review which we have made of the origin and meaning of the expression "uniform throughout the United States." From that review it appears that the very objection upon which the proposition now advanced must rest was urged in the Continental Congress as the reason why the levy of uniform duties, imposts and excises throughout the United States should not be authorized. This is shown by the objection of Mr. Rutledge and the suggestion of Mr. Lee. It is further shown by the protest of Rhode Island, and the reasons advanced why a duty on salt should not be levied. But it was seen that if it were required, not only that the duties, imposts and excises should be uniform throughout the United States, but that in imposing them objects should be selected existing in equal quantity in the several States, the

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grant of power to levy duties, imposts and excises would be a failure. In the convention which framed the Constitution the same argument was used without success, and, as we have seen, the only ground upon which the striking out of the words "and equal" after the word "uniform," in the adoption of the clause as now found in the Constitution, can be reasonably explained, is that it was done to prevent the implication that the duties, imposts and excises which were to be uniform throughout the United States were to be placed upon rights equally existing in the several States. To now adopt the proposition relied on would be virtually, then, to nullify the action of the convention, and would relegate the taxing power of Congress to the impotent condition in which it was during the Confederation.

Lastly, it is urged that the progressive rate feature of the statute is so repugnant to fundamental principles of equality and justice that the law should be held to be void, even although it transgresses no express limitation in the Constitution. Without intimating any opinion as to the existence of a right in the courts to exercise the power which is thus invoked, it is apparent that the argument as to the enormity of the tax is without merit. It was disposed of in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 293.

The review which we have made exhibits the fact that taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial. The grave consequences which it is asserted must arise in the future if the right to levy a progressive tax be recognized involves in its ultimate aspect the mere assertion that free and representative government is a failure, and that the grossest abuses of power are foreshadowed unless the courts usurp a purely legislative function. If a case should ever arise, where an arbitrary and confiscatory exaction is imposed bearing the guise of a progressive or any other form of tax, it will be time enough to consider

MR. JUSTICE HARLAN, dissenting.

whether the judicial power can afford a remedy by applying inherent and fundamental principles for the protection of the individual, even though there be no express authority in the Constitution to do so. That the law which we have construed affords no ground for the contention that the tax imposed is arbitrary and confiscatory, is obvious.

It follows from the foregoing opinion that the court below erred in denying all relief, and that it should have held the plaintiff entitled to recover so much of the tax as resulted from taxing legacies not exceeding ten thousand dollars, and from increasing the tax rate with reference to the whole amount of the personal estate of the deceased from which the legacies or distributive shares were derived. For these reasons

The judgment below must be reversed and the case be remanded, with instructions that further proceedings be had according to law and in conformity with this opinion, and it is so ordered.

MR. JUSTICE BREWER dissented from so much of the opinion as holds that a progressive rate of tax can be validly imposed. In other respects he concurred.

MR. JUSTICE PECKHAM took no part in the decision.

MR. JUSTICE HARLAN, with whom concurred MR. JUSTICE McKENNA, dissenting.

While I concur in the construction placed by the court upon the clause of the Constitution declaring that all duties, imposts and excises shall be "uniform throughout the United States," I dissent from that part of the opinion construing the twenty-ninth and thirtieth sections of the Revenue Act. In my judgment, the question whether the tax presented by Congress shall or shall not be imposed is to be determined with reference to the whole amount of the personal property out of which legacies and distributive shares arise. If the value of the whole personal property held in charge or trust by an administrator, executor or trustee exceeds ten thousand dollars, then every part of it constituting a legacy or distributive share, except the share of

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a husband or wife, is taxed at the progressive rate stated in the act of Congress. I do not think the act can be otherwise interpreted without defeating the intent of Congress.

Construed as I have indicated, the act is not liable to any constitutional objection.

HIGH v. COYNE.APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS.

No. 225 Argued December 5, 6, 7, 1899.—Decided May 14, 1900.

The assignments of error in this case raised only the constitutionality of the taxes sought to be recovered, which has just been decided adversely to the plaintiffs in error in *Knowlton v. Moore*, ante, 41, and there is nothing in the record to enable the court to see that the statute was mistakingly construed by the collector; but as the interpretation of the statute which was adopted and enforced by the officers administering the law was the one held to be unsound in *Knowlton v. Moore*, the ends of justice require that the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute should not be foreclosed by the decree of this court.

THE complainants, who are appellants here, filed their bill to enjoin the executrix of their father's estate from paying the legacy taxes levied by sections 29 and 30 of the War Revenue Act of 1898. The collector of internal revenue was also made a defendant, and an injunction was asked against him to prevent his collecting or attempting to collect the taxes in question, which, it was asserted, he was about to enforce against the executrix, who, it was averred, would pay unless by the writ of injunction she was forbidden to do so. As heirs of their father and as beneficiaries of his estate, the complainants asserted they were entitled to prevent the executrix from making payment of taxes which were unconstitutional and hence void. The reasons relied on to show that the taxing law was repugnant to the Constitution of the United States were that the taxes were direct and not apportioned, were not uniform and were levied on ob-

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jects beyond the scope of the authority of Congress. The bill was demurred to as not stating ground for relief. The demurrers were sustained, and from a decree dismissing the suit this appeal is prosecuted.

Mr. A. M. Pence and *Mr. John G. Carlisle* for appellants. *Mr. George A. Carpenter* and *Mr. Shirley T. High* were on *Mr. Pence's* brief.

Mr. Solicitor General for appellees. He also filed a brief on the question submitted by the court referred to in the previous cases.

MR. JUSTICE WHITE delivered the opinion of the court.

As the court below did not grant an injunction, but dismissed the bill, it is unnecessary to consider whether the right would have existed to enjoin the collector of internal revenue even had the court concluded that the averments of the bill disclosed a cause of action. Rev. Stat. 3226.

Every ground relied on to maintain that the taxes levied by sections 29 and 30 of the War Revenue Act are repugnant to the Constitution has been decided adversely in the opinion this day announced in *Knowlton v. Moore*.

This disposes of this case, as the assignments of error raised only the constitutionality of the taxes, and there is nothing in the record to enable us to see that the statute was, by the collector, mistakingly construed.

As, however, the interpretation of the statute, which was held to be unsound in No. 387, was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction must have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to resist so much of the tax as may have arisen from the wrong interpretation of the statute above referred to be not foreclosed by our decree.

Decree affirmed, without prejudice to any such right.

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FIDELITY INSURANCE TRUST AND SAFE DEPOSIT
COMPANY v. McCLAIN.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
EASTERN DISTRICT OF PENNSYLVANIA.

No. 451. Argued and submitted December 5, 6, 7, 1899.—Decided May 14, 1900.

The judgment in *High v. Coyne*, ante, 111, is followed in this case.

THE case is stated in the opinion.

Mr. Richard C. Dale for plaintiff in error. *Mr. Dale*, *Mr. Samuel Dickson* and *Mr. John C. Bullitt* filed a supplemental brief for plaintiff in error under the order of court of February 26, 1900.

Mr. Solicitor General for defendant in error. He also filed an additional brief under the order of court.

MR. JUSTICE WHITE delivered the opinion of the court.

This action was begun in the Court of Common Pleas for the county of Philadelphia, State of Pennsylvania, to recover from the defendant, a collector of internal revenue, the sum of \$168.75, with interest, being the amount of an assessment made by the defendant under the authority of sections 29 and 30 of the War Revenue Act of June 30, 1898, which we have just considered. The statement of claim filed on behalf of the plaintiff contained an averment of the amount of the tax paid, without any particular description of the mode in which it had been levied. It was averred that the payment of the tax had been made under protest, and because of threats to distrain, etc. It was also further stated that an application for refunding had been refused, and judgment was prayed for the amount of the tax. The demand was based solely on the ground of the unconstitutionality of the statute, which was asserted to exist, because the tax was direct

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and had not been apportioned, and, if not direct, was wanting in uniformity.

The cause was removed into the Circuit Court of the United States for the Eastern District of Pennsylvania. The defendant demurred on the ground that no cause of action was stated, and the demurrer was sustained. A judgment having been entered in favor of the defendant, the present writ of error was prosecuted.

The record contains the protest made at the time of the payment of the tax and the petition for refunding. Both of these documents disclose that the sole ground urged against the assessment and collection of the tax was the unconstitutionality of the statute in the particulars above mentioned. This constitutional objection, as we have already said, was the only ground alleged in the statement of the case. The assignment of errors here made also confines the issue solely to the constitutional questions already referred to. There is nothing in the record to show the amount of the estate, the legacies or distributive shares therein, or upon what basis the collector proceeded in assessing the tax. It contains therefore nothing from which it can be said that if the law under which the tax was laid be constitutional, an excessive tax was imposed. In *Knowlton v. Moore*, No. 387 of this term, *ante*, 41, it was held that the law in question was constitutional. As, however, the interpretation of the statute which was held to be unsound in No. 387 was the one which was adopted and enforced by the officers charged with the administration of the law, the impression naturally arises that such erroneous construction may have been applied in assessing the tax in controversy. The ends of justice therefore require that the right to relief as to so much of the tax, if any, as may have arisen from the wrong interpretation of the statute above referred to, be not foreclosed by our judgment.

Judgment affirmed, without prejudice to the right to any such relief.

MURDOCK v. WARD.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

No. 458. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

Knowlton v. Moore, ante, 41, followed in this case as to the points there decided.

Plummer v. Coler, ante, 115, affirmed and followed in this case.

As the parties below proceeded upon a mutual mistake of law in construing and applying the statute the court thinks that the practical injustice that might result from an affirmance of the judgment may be avoided by reversing it at the cost of the plaintiff in error, and sending the cause back to the Circuit Court, with directions to proceed therein according to law.

IN October, 1899, George T. Murdock, as executor of the last will and testament of Jane H. Sherman, brought an action in the Supreme Court of the State of New York, against John G. Ward, collector of internal revenue for the fourteenth district of the State of New York, wherein the plaintiff sought to recover the sum of \$36,827.53, which the plaintiff alleged had been unlawfully exacted from him as executor of said estate.

On petition of the defendant, the cause was removed into the Circuit Court of the United States for the Southern District of New York.

The complaint contained the following allegations:

"I. Jane H. Sherman, late of the village of Port Henry, in the county of Essex and State of New York, died on about the 30th day of September, 1898, leaving certain property, and also leaving a last will and testament, in and by which said will this

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plaintiff, George T. Murdock, was appointed to be, and by due order of the surrogate of the county of Essex, in the State of New York, to whom jurisdiction in that behalf pertained, he has become, and is, the sole executor of the said last will and testament of said Jane H. Sherman.

"II. The plaintiff further alleges and states that the said Jane H. Sherman, deceased, upon her death left a very considerable amount of personal property, amounting to upwards of one million of dollars.

"III. That the defendant, John G. Ward, at all the times mentioned in this complaint, was and he is collector of internal revenue for the fourteenth district of the State of New York, having his office and official place of residence at the city of Albany, in the State of New York.

"IV. That said John G. Ward, assuming to act as such collector, and assuming and pretending to act under and by virtue of the laws of the United States, which he assumed conferred authority upon him therefor, and particularly under and in pursuance of the provisions of an act of the Congress of the United States, commonly known as the 'war revenue law' of June 13, 1898, and being an act to provide ways and means to meet war expenditures, and for other purposes, passed by the Congress of the United States, and becoming a law on the 13th day of June, 1898, did, on or about the fourth day of April, 1899, by force and duress, exact, demand and collect from this plaintiff and from the estate represented by him as such executor the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents, (\$36,827.53,) and upon the claim and under the pretext that the same was a lawful assessment as an internal revenue tax upon the estate of said deceased and against this plaintiff, as executor of said deceased, on account of the legacies or distributive shares arising from personal property, being in charge or trust of this plaintiff, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman.

"V. That on or about the 8th day of April, 1899, this plaintiff, under protest, and protesting that he was not nor was the estate represented by him liable to pay said tax, involuntarily

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and under duress, because of the illegal demand made upon him by said defendant, did pay to the said defendant as such collector, as aforesaid, the said sum of \$36,827.53.

“VI. That thereafter, believing the imposition of said tax and its collection to be unlawful, this plaintiff did appeal to the Commissioner of Internal Revenue and to the Treasury Department of the United States of America from the action and decision of said defendant in holding this plaintiff to be liable for the payment of said tax and in collecting the said tax in manner aforesaid, and did state and represent to said Commissioner that the collection of said tax was unlawful, and that the amount thereof should be refunded for the following reasons:

“‘First. The imposition of said tax was unconstitutional, unlawful and void.

“‘Second. The imposition and collection of said tax deprived this deponent of his property and the estate represented by him of its property without due process of law.

“‘Third. That the law imposing said tax is not uniform, and does not afford equal protection of the laws to persons throughout the United States.

“‘Fourth. That the law imposing said tax denied and does deny to persons throughout the United States and within its jurisdiction the equal protection of the laws.

“‘Fifth. That the law under which said tax was imposed denies to this deponent the equal protection of the laws.

“‘Sixth. The tax so imposed is a direct tax, and is void because not apportioned among the States in proportion to their population and in accordance with the provisions of the Constitution of the United States.

“‘Seventh. If said tax is an impost, excise or duty, the law imposing the same is unconstitutional and void, because the tax levied is not uniform throughout the United States, as required by the Constitution of the United States; and

“‘Eighth. It is not within the province of the constitutional powers of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the State of New York.’

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"And this plaintiff did, in and by such appeal, claim that he was entitled to have the sum of money so paid and the amount thereof refunded, and he did then and there ask and demand the return of the same moneys to him, and did appeal from the act of said defendant, as such collector, in imposing said tax and exacting from plaintiff payment of the amount thereof.

"VII. On the 21st day of October, 1899, the said Commissioner of Internal Revenue and the Treasury Department of the United States, represented by the said Commissioner of Internal Revenue, did disallow the appeal of this plaintiff in the behalf above stated, and did reject the claim of the plaintiff to have refunded the amount of the tax paid as aforesaid.

"VII. A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding, as executor, as aforesaid, or otherwise of such bonds and certificates of indebtedness.

"IX. This plaintiff claims and charges that by reason of the premises the amount of said tax has been unlawfully exacted from him as executor of said estate; that each and every of the grounds stated by him in the above-mentioned appeal to the said Commissioner of Internal Revenue states and represents a true and lawful reason why the imposition of said tax is unlawful and why the said tax should be refunded.

"Wherefore this plaintiff demands judgment against the said defendant for the sum of thirty-six thousand eight hundred and twenty-seven dollars and fifty-three cents, (\$36,827.53,) with interest from the 8th day of April, 1899, with the costs of this action."

The defendant, appearing by Henry L. Burnett, United States attorney for the Southern District of New York, demurred to the complaint upon the ground that the complaint did not state facts to constitute a cause of action.

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On November 14, 1899, after hearing, the Circuit Court sustained the demurrer and ordered the complaint to be dismissed with costs to the defendant. Thereupon a writ of error was allowed to the judgment and the cause was brought to this court.

Mr. John G. Carlisle and *Mr. Charles E. Patterson* for plaintiffs in error. *Mr. Alpheus T. Bulkeley* was on *Mr. Patterson's* brief.

Mr. Solicitor General for defendant in error.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

That the tax imposed under the provisions of the revenue act of June 13, 1898, is a direct tax, and, therefore, void because not apportioned among the States in proportion to their population; that if not a direct tax, but an impost, excise or duty, it is void, because the tax levied is not uniform throughout the United States; and that it is not within the province of the constitutional power of the United States to levy a tax upon a right of inheritance or disposition by will, provided for by the laws of the State of New York, are contentions of the plaintiff in error which have been determined against him in the case of *Knowlton and Buffum, Executors, v. Moore, Collector, ante, 41*, just decided by this court. The opinion in that case so fully discusses the arguments urged in support of those propositions that their further consideration is unnecessary.

The remaining question is that presented by the following assignment of error:

"The court erred in refusing to find that, in so far as the estate of the deceased consisted of the government bonds of the United States mentioned in said complaint, the Congress had no right or authority to impose or assess any tax upon the same, and in refusing to find that the plaintiff in error was entitled to recover back from the defendant in error in this action the amount of the tax mentioned in his complaint, and which was assessed against the plaintiff in error because of his ownership as executor, as aforesaid, of such bonds of the government of the United States."

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The only allegation in the complaint respecting bonds of the United States is contained in the eighth paragraph, which is as follows:

“A very large proportion and at least one third of the personal estate upon account of which said tax was exacted from and paid by this plaintiff consisted in the bonds and interest-bearing evidences of debt issued by the government of the United States, and which by contract between the United States and the holders thereof were and are not subject or liable to assessment or taxation, nor was or is this plaintiff subject or liable to assessment or taxation by means of his ownership or holding as executor, as aforesaid, or otherwise, of such bonds and certificates of indebtedness.”

The complaint does not set forth the terms of the will, nor attach a copy of it as an exhibit. And it is suggested in the brief of the Solicitor General, filed on behalf of the United States, that, as presented by the record, this is not a case where United States bonds have passed from the testatrix to legatees, but where a personal estate of a certain value in money has passed to the executor to be charged against him as money, to be distributed among the beneficiaries under the will; and that, therefore, for aught that appears, the executor may have sold every bond and distributed the proceeds in money; and that, even if legatees, entitled to certain sums of money, shall have accepted United States bonds in lieu of money, they would take the bonds, not under the will, but as purchasers.

However, the complaint does allege that the money which is sought to be recovered was assessed against the plaintiff as executor of the deceased “on account of legacies or distributive shares arising from personal property being in his charge or trust, as such executor as aforesaid, the properties assumed to be assessed for such tax being properties passing from the said Jane H. Sherman,” and were paid by him under duress. Such allegations, taken in connection with that contained in the eighth paragraph, above quoted, to the effect that, of the property taxed, at least one third part consisted of United States bonds, makes it to sufficiently appear that United States bonds, in the hands of the plaintiff as executor or trustee under a will, were

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included as a portion of the estate passing to the executor, and were assessed and taxed as such portion. It may also be observed that it is the executor or trustee who has in charge the legacies or distributive shares arising from personal property, passing after the passage of the act, from any person possessed of such property, who is the person taxed in respect to such property. Accordingly, we think there is room in this record for the contention of the plaintiff in error that, as matter of fact, bonds of the United States formed a portion of the property actually assessed; and that, consequently, the court is called upon to determine whether it was obligatory on the executor of Jane H. Sherman to include in his statement to the collector bonds of the United States in his possession and charge as such executor, and whether it was the right and duty of the collector to demand and receive from the executor a sum of money measured by the value of the property in his hands, although composed in part of United States bonds.

Putting aside, as already disposed of in the case of *Knowlton v. Moore*, the claims that inheritance and legacy taxes imposed by the United States in the act of June 13, 1898, are invalid because, as direct taxes, not apportioned, or, as duties, for want of uniformity, or because the taxing power of the United States does not reach such property transmissible under the laws of the States, it is conceded, as we understand the argument of the plaintiff in error, that United States bonds would be properly included in estimating the amount of an inheritance or legacy tax, were it not for the clauses contained in the United States statutes exempting such bonds from state and Federal taxation. On the other hand, it is not denied by the counsel for the government that it was the intention of those clauses to exempt the bonds and interest thereon from any Federal tax, direct or indirect. What is denied is that there was any intention on the part of Congress, by the clauses mentioned, to exempt the portion of an estate invested in United States bonds from either a state or Federal inheritance tax.

It is claimed by the plaintiff in error, and conceded by the government, that the exemption clause was incorporated into the bonds and became a subsisting contract between the gov-

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ernment and the bondholders. It is further contended on the one side and conceded on the other, that this contract extends to the *assigns* of the holders. But a legal issue is joined when it is affirmed by the plaintiff in error and denied by the government, that *assigns* must be interpreted to include those whose title is derived under the inheritance and legacy laws of the States.

It has just been decided by this court, in the case of *Plummer, Executor, v. Coler, ante*, 115, where the question involved was the validity of the inheritance tax law of the State of New York when applied to a legacy consisting of United States bonds containing a clause of exemption from state and Federal taxation, that the conclusion fairly to be drawn from the state and Federal cases is that the right to take property by will or descent is derived from and regulated by municipal law; that, in assessing a tax upon such right or privilege, the State may lawfully measure or fix the amount of the tax by referring to the value of the property passing; and that the incidental fact that such property is composed, in whole or in part, of Federal securities, does not invalidate the tax or the law under which it is imposed.

It may be said that in that case we were dealing with the sovereign power of a State to tax property within her own limits; but still the contention had to be met that Federal bonds were not within the taxing power of the State, not only because they were declared to be exempt from state taxation in any form, but because they were means devised by the government to raise money, and that such a purpose might be defeated if the States were permitted to tax the bonds in the hands of their holders. The conclusion, however, was reached, following state and Federal cases cited, that the inheritance or legacy tax law of the State of New York did not expressly, or by necessary implication, propose to tax Federal securities; that the tax was not imposed on the property passing under the state laws, but on the right of transfer by will or under the intestate law of the State; that whatever the form of the property, the right to succeed to it is created by law, and if it consists of United States bonds, the transferee derives his right to take them, as

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he does his right to take any other property of the decedent, under the laws of the State, and the State by its statutes makes the right subject to the burden imposed.

A similar distinction has been recognized by several of the state courts, which have held that while a tax imposed on United States bonds by a state statute would be invalid because beyond the reach of the state's power to tax, yet that a tax upon the franchises or capital stock of a state corporation, measured by the value of its entire property, would be valid, even if the property was composed in whole or in part of Federal securities, because the tax can be regarded as imposed, not on specific property, but on the rights and privileges bestowed by the State. *Commonwealth v. Provident Institution*, 12 Allen, 312; *Commonwealth v. Hamilton Manuf'g Company*, 12 Allen, 298; *Coite v. Society for Savings*, 32 Conn. 173.

The judgments in those cases, holding that state taxes may be lawfully imposed, the amount of which may be determined by the aggregate amount of the property or capital stock of banking or manufacturing companies, even if such property or capital stock includes United States bonds issued under a statute declaring them exempt from taxation under state authority, were affirmed by this court. *Society for Savings v. Coite*, 6 Wall. 594; *Insurance Co. v. Massachusetts*, 6 Wall. 611; *Hamilton Manufacturing Co. v. Massachusetts*, 6 Wall. 632.

Without repeating the discussion in the opinion in *Plummer, Esqr. v. Coler*, and following the conclusion there reached, we are unable to distinguish that case from the present one.

If a state inheritance law can validly impose a tax measured by the amount or value of the legacy, even if that amount includes United States bonds, the reasoning that justifies such a conclusion must, when applied to the case of a Federal inheritance law taxing the very same legacy, bring us to the same conclusion. We must, therefore, hold that if, as held in *Knowlton v. Moore*, the tax imposed under the act of June 13, 1898, is not invalid as a direct, unapportioned tax, nor for want of uniformity, nor as an infringement upon the laws of the states regulating wills and descents, then the tax upon legacies or be-

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quests, descendible under and regulated by state laws, is valid, even if such legacies incidentally are composed of Federal bonds.

It cannot be denied that the government of the United States has, and has heretofore exercised, the power to tax its own bonds. By the act of July 1, 1862, 12 Stat. 474, there was imposed a tax upon the interest on United States bonds at one half the rate of the tax imposed upon the income of other property; and by the acts of June 30, 1864, 13 Stat. 281 and 479, the discrimination in favor of the holders of United States bonds was abandoned, and the interest on them was taxed at the like rates as other income.

The argument in this case turns, at last, upon the proposition that, by the exempting clauses in the statutes and on the face of the bonds, the United States entered into a contract with those who should buy and hold the bonds that neither principal nor interest should be taxed.

Whether the United States, in the exercise of the power of taxation, can be estopped by a contract that such power shall not be exercised, we need not consider, because the contract in this case does not, as we view it, mean that a State may not, or the United States may not, tax inheritances and legacies, regardless of the character of the property of which they are composed. That some of the holders of United States bonds may have paid franchise taxes to the States, and others may have paid state or Federal inheritance and legacy taxes, has nothing to do with the contract between the United States and the bondholders. The United States will have complied with their contract when they pay to the original holders of their bonds, or to their assigns, the interest, when due, in full, and the principal, when due, in full.

These views demand an affirmance of the judgment of the Circuit Court sustaining the defendant's demurrer to the complaint.

We observe that it appears in the schedule of legacies prepared by the executor in this case, on a form apparently furnished by the collector of internal revenue, that several of the legacies under Mrs. Sherman's will were for sums under ten thousand dollars, and which were, therefore, under the construc-

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tion put by this court on the statute in *Knowlton v. Moore*, not taxable. It also appears that the theory on which the taxes were computed in respect to legacies over ten thousand dollars was by measuring the tax by the amount of the entire estate, instead of by the amount of each legacy. This method of construing and applying the statute we have held, in *Knowlton v. Moore*, to be erroneous. Therefore, the executor, representing the respective legatees, is entitled to recover back the amount of taxes paid on legacies under ten thousand dollars, and likewise such excess of taxes as was paid by reason of the erroneous interpretation of the statute.

We here meet the formal difficulty that neither the complaint in the Circuit Court nor the assignments in error in this court apparently questioned the correctness of the construction put upon the statute by the collector. The questions raised and considered only involved the validity of the act, and not its construction if valid.

As, however, the parties proceeded on a mutual mistake of law, we think the practical injustice that might result from an affirmance of the judgment may be avoided by reversing the judgment at the cost of the plaintiff in error, and sending the cause back to the Circuit Court with directions to proceed therein according to law.

And accordingly it so ordered.

MR. JUSTICE WHITE dissented in respect to the taxability of the bonds.

MR. JUSTICE PECKHAM took no part in the decision of the case.

Statement of the Case.

SHERMAN v. UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF NEW YORK.

No. 459. Argued December 5, 6, 7, 1899. — Decided May 14, 1900.

Knowlton v. Moore, ante, 41, and *Murdock v. Ward*, ante, 139, followed.

IN the Circuit Court of the United States for the Northern District of New York, on November 20, 1899, George D. Sherman filed a complaint against the United States seeking to recover from said defendant the sum of \$8969.02, which he claimed had been unjustly exacted by John G. Ward, collector of internal revenue for the fourteenth district of New York, from George T. Murdock, executor of the last will of Mrs. Jane H. Sherman, the mother of complainant, as a duty or tax imposed by virtue of the provision of the act of June 13, 1898; that said sum of \$8969.02 was deducted by the said executor from the income due and payable under the provisions of said will to the complainant; that the income, of which the complainant was entitled to receive an annual portion during his life, was composed in part of United States bonds, which the complainant avers to be, by virtue of the acts of Congress under which they were issued, non-taxable and non-assessable for the purposes of taxation.

The complaint further alleged, among other things, that the tax so imposed was void because a direct tax, not apportioned among the States in proportion to their population; that if said tax was not direct, but an impost, excise or duty, the same was void, because not uniform throughout the United States; and that it is not within the constitutional power of Congress to levy a tax upon a right of inheritance or disposition by will provided for by the laws of the State of New York, or to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee, because of the greater wealth of the donor of such legacy, than is required when the legacy is a gift of a testator of smaller means.

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The United States, appearing by Charles H. Brown, United States Attorney for the Northern District of New York, demurred to the complaint upon the ground that the same did not state facts sufficient to constitute a cause of action. On hearing the Circuit Court sustained the demurrer, and ordered that the complaint be dismissed. A writ of error was allowed to this judgment, and the cause was brought to this court.

Mr. John G. Carlisle and *Mr. Charles E. Patterson* for plaintiffs in error.

Mr. Solicitor General for defendant in error.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

In so far as the contentions urged in this action are based on the allegation that the tax imposed on the legacies left in the will of Mrs. Jane H. Sherman is void because it is an unapportioned, direct tax, or, if not a direct tax but a duty or excise, the same is void because not uniform throughout the United States, or void because it is not competent to levy an inheritance or legacy tax upon property passing to legatees under the laws of the State of New York, they have been disposed of adversely to the plaintiff, in the case of *Knowlton, Executor, v. Moore, Collector*, ante, 41, recently decided by this court.

So, too, the proposition that bonds of the United States and the income therefrom are not lawfully taxable under an inheritance tax law of the United States, because exempted by contract from such tax, has just been decided not to be well founded, in the case of *Murdock v. John G. Ward*, ante, 139.

The allegation in the complaint that "it is not within the constitutional power of Congress to require the payment of a larger or different amount of tax from or imposed upon a legacy or a legatee because of the greater wealth of the donor of such legacy than is required when the legacy is the gift of a testator of smaller means," need not be considered, because this court has held, in the case of *Knowlton, Executor, v. Moore*, that, upon a proper construction of the act of June 13, 1898, the

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amount of the inheritance or legacy tax levied thereunder is measured by the amount of the legacy or distributive share passing under the laws of the State, and not by the amount of the estate of the testator or of the deceased owner.

As, however, it appears in this record that the taxes actually levied and paid on the legacies left by the will of Mrs. Sherman were computed upon the mistaken assumption that the amount of the estate of the testatrix was the measure of the tax, and not the amount of the respective legacies, the complainant is entitled to be repaid the excess thus imposed upon his legacy. As we have reversed the judgment in the case of *Murdock, as Executor of Mrs. Sherman, v. The Collector*, and have remanded that case to the Circuit Court of the Southern District of New York, in order that the erroneous computation may be corrected, and as thus what is coming to the plaintiff in error, upon such correction being made, will be recovered by Murdock as executor and trustee under the will of Mrs. Sherman, and thereby and in that case the plaintiff in error will be indemnified, he needs no further proceeding in his suit in the Circuit Court for the Northern District of New York. Lest, however, the judgment dismissing his complaint may embarrass his right to claim indemnity from the executor, we shall reverse this judgment, and it is so ordered.

Reversed.

MR. JUSTICE WHITE dissented in respect to the taxability of the bonds.

MR. JUSTICE PECKHAM took no part in the decision of the case.